Applicant Details

First Name	**Kathryn**
Middle Initial	**L.**
Last Name	**Baxter**
Citizenship Status	**U. S. Citizen**
Email Address	**kathrynbaxter@umaryland.edu**
Address	**Address** Street **104 W. Barre St.** City **Baltimore** State/Territory **Maryland** Zip **21201** Country **United States**
Contact Phone Number	**267.625.8129**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**May 2011**
JD/LLB From	**University of Maryland Francis King Carey School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011**
Date of JD/LLB	**May 18, 2023**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Maryland Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Kobrin, Daniel
dkobrin@law.umaryland.edu
Moon, William
wmoon@law.umaryland.edu
4107067214

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kathryn Baxter
104 W. Barre St.
Baltimore, MD 21201

June 12, 2023

The Honorable Tanya Chutkan
United States District Court for the District of Columbia
333 Constitution Ave., NW
Washington, DC 20001

Dear Judge Chutkan:

I am a recent graduate of the University of Maryland Francis King Carey School of Law interested in serving as one of your judicial clerks for the September 2024–2025 term. As a professional who has dedicated her career to public service, I am looking for a federal clerkship in the mid-Atlantic area where I can learn from a judge who has shown a commitment to public interest work in her career. I particularly admire your past work at the Public Defenders Service for the District of Columbia; in my final year of my evening law program, I cut back to part-time at my job specifically so I could pursue an externship at PDS because I wanted to explore criminal practice while working under talented individuals dedicated to zealous client advocacy. I would welcome the opportunity to learn from your professional experiences and am eager to apply my legal writing and research skills to support you and your chambers in this role.

Throughout law school, I have developed strong legal research skills. As a student attorney in the UMB Fair Housing Clinic, I conducted research on the application of specific legal doctrines in different federal jurisdictions; the outcome of my research informed the direction of two impact litigation cases, including the content of pleadings and the response to a discovery request. Furthermore, in my role as research assistant for two separate professors, I honed my legal research skills for both objective and persuasive purposes. One of the articles for which I assisted with research was selected to be the lead article in the first issue of Volume 82 of the *Maryland Law Review*.

I also have the strong legal writing skills needed in a clerkship role. In an Advanced Appellate Advocacy elective, I wrote both an appellate and appellee brief based on an actual Maryland circuit court case; an excerpt from one of my briefs from this course is enclosed as a writing sample. In addition, as a staff editor for *Maryland Law Review*, I wrote a case note on a Maryland Court of Appeals case regarding jury nullification. To further develop my legal writing skills, I have enrolled in elective courses with substantial writing assignments, including a research paper on criminal disenfranchisement for a seminar course on Race and Criminal Justice.

My commitment to practicing public interest law is reflected in my choice of courses, including electives such as Race and Criminal Justice, Law and Social Change, and Consumer Protection. My decision to pursue a part-time rather than a full-time law program was also driven by my dedication to public interest; enrolling in an evening program allowed me to continue working at my job improving public systems for children and youth with significant behavioral health needs while I pursued my law degree. I believe the skills, knowledge, and guidance I acquire from a clerkship in your chambers will be an invaluable start to a long career in public interest law.

Please contact me at KathrynBaxter@umaryland.edu or 267.625.8129 if I can provide any additional information. Thank you for your consideration.

Sincerely,
/s/
Kathryn Baxter

KATHRYN BAXTER

She/Her | KathrynBaxter@umaryland.edu | 267.625.8129 | www.linkedin.com/in/kathryn-baxter | Baltimore, MD 21201

EDUCATION

University of Maryland Francis King Carey School of Law, Baltimore, MD
Juris Doctor, *magna cum laude*, 2023 / GPA: 3.97 / Rank: 7/200

University of Arkansas Clinton School of Public Service, Little Rock, AR
Master of Public Service, 2016 / 2016 Academic Achievement Award

American University, Washington, D.C.
B.A. in Public Communication, Certificate in Advanced Leadership Studies, 2011

LEGAL EXPERIENCE

Sept. 2023-Aug. 2024 **Incoming Judicial Law Clerk,** Justice Angela M. Eaves, Supreme Court of Maryland

Aug. 2021-May 2023 **Associate Editor** (Vol. 82); **Staff Editor** (Vol. 81), Maryland Law Review
Reviewed articles for clarity and alignment with both *The Bluebook* and Maryland Law Review style standards. Vetted 120+ sources for Volume 81 to ensure the accuracy of all assertions and quotes.

Sept. 2022-Dec. 2022 **Extern**, Public Defender Service for the District of Columbia (PDS), Juvenile Trial Division
Conducted D.C. case law research regarding issues in clients' cases (e.g., Fourth Amendment searches, accomplice liability). Reviewed discovery material to analyze the likelihood of the prosecution establishing the elements of each crime charged and drafted memoranda on conclusions.

May 2022-June 2022 **Research Assistant**, Professor Will Moon
Conducted legal research on emerging issues in corporate law and drafted a related memorandum.

Jan. 2022-May 2022 **Student Attorney**, Fair Housing Clinic, University of Maryland Francis King Carey School of Law
Conducted legal research on application of the federal Fair Housing Act in different jurisdictions to inform the development of two impact litigation cases. Analyzed documents and coordinated with client to revise, finalize, and file a civil complaint for violation of state housing discrimination laws.

July 2021-Feb. 2022 **Research Assistant**, Professors Doug Colbert and Colin Starger
Conducted legal research and provided editing support for Doug Colbert & Colin Starger, *A Butterfly in COVID: Structural Racism and Baltimore's Pretrial Legal System*, 82 MD. L. REV. 1 (2022).

OTHER WORK EXPERIENCE

Apr. 2018-May 2023 **Senior Policy Analyst** (June 2021-May 2023); **Policy Analyst** (Apr. 2018-June 2021), The Institute for Innovation and Implementation, University of Maryland Baltimore School of Social Work
Provided technical assistance to multiple states' child- and family-serving systems to comply with the Family First Prevention Services Act of 2018 and other relevant statutes. Served on a Subject Matter Expert team supporting an agreement between the U.S. Department of Justice and West Virginia regarding the state's service system for children with serious mental health conditions.

Nov. 2016-Apr. 2018 **Program Manager**, Center for School Mental Health, University of Maryland Baltimore School of Medicine
Coordinated technical assistance for the National Quality Initiative, including supporting a network of 20 districts representing over one million students to promote school mental health quality and sustainability.

June 2012-Apr. 2014 **Foundation and Policy Officer**; **Legislative Assistant** (June 2012-Nov. 2013), Immigration Equality
Collaborated with legal team to promote administrative and legislative policy change and address individual client needs. Developed advocacy materials such as policy fact sheets, sign-on letters, and training resources.

RECOGNITIONS

May 2023 **Law School Alumni Association Award.** Awarded to the graduating student deemed by the faculty to have contributed most largely to the school through their qualities of character and leadership.

May 2022 **CALI Award.** Writing in Law Practice: Advanced Appellate Advocacy

(/StudentSelfService/)

Ms. Kathryn L Baxter

Student Academic Transcript

Academic Transcript

Transcript Level

School of Law

Transcript Type

Academic Record

Student Information Degrees Awarded Institution Credit Transcript Totals

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name

Kathryn Baxter

Curriculum Information

Current Program : Juris Doctor

Program

Law Evening

Major and Department

Law, Law

Degrees Awarded

Degree Awarded	Degree Date	Institutional Honors
Juris Doctor	05/18/2023	Magna Cum Laude

Curriculum Information

Primary Degree

Major

Law

Institution Credit

Term : Fall 2019

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	528E	LW	CON LAW I: GOVERNANCE	A	3.000	12.00		
LAW	531E	LW	LEGAL ANALYSIS AND WRITING	A	3.000	12.00		
LAW	535E	LW	TORTS	A	4.000	16.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.00	4.00
Cumulative	10.000	10.000	10.000	10.000	40.00	4.00

Term : Spring 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	527E	LW	CIVIL PROCEDURE	P	4.000	0.00		
LAW	529A	LW	CON LAW II: INDIVIDUAL RIGHTS	P	3.000	0.00		
LAW	550E	LW	INTRODUCTION TO LEGAL RESEARCH	A-	1.000	3.67		

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	551A	LW	WRITTEN AND ORAL ADVOCACY	P	2.000	0.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	1.000	3.67	3.67
Cumulative	20.000	20.000	20.000	11.000	43.67	3.97

Term : Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	506E	LW	CRIMINAL LAW	A	3.000	12.00		
LAW	530E	LW	CONTRACTS	A	4.000	16.00		
LAW	546F	LW	CLS: RACE & CRIM JUST SYSTEM	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.00	4.00
Cumulative	30.000	30.000	30.000	21.000	83.67	3.98

Term : Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	515U	LW	LAW AND SOCIAL CHANGE	A	3.000	12.00		
LAW	534E	LW	PROPERTY	A-	4.000	14.68		
LAW	558H	LW	LEGAL PROFESSION	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	38.68	3.87
Cumulative	40.000	40.000	40.000	31.000	122.35	3.95

Term : Summer 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	580F	LW	FAMILY LAW	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	3.000	3.000	3.000	3.000	12.00	4.00
Cumulative	43.000	43.000	43.000	34.000	134.35	3.95

Term : Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	501F	LW	ADMINISTRATIVE LAW	A+	3.000	12.99		
LAW	515H	LW	CRIMINAL PROCEDURE	A-	3.000	11.01		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	536B	LW	CONSUMER PROTECTION SEM/COURSE	A	2.000	8.00		
LAW	576C	LW	ADV LEG RESEARCH(DISTANCE EDU)	A	1.000	4.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	9.000	36.00	4.00
Cumulative	53.000	53.000	53.000	43.000	170.35	3.96

Term : Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	548R	LW	WRITING LAW PRAC:ADV APP ADVOC	A+	3.000	12.99		
LAW	594S	LW	FAIR HOUSING CLINIC	A-	6.000	22.02		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	9.000	35.01	3.89
Cumulative	63.000	63.000	63.000	52.000	205.36	3.95

Term : Summer 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	578F	LW	EVIDENCE	A+	3.000	12.99		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	3.000	3.000	3.000	3.000	12.99	4.33
Cumulative	66.000	66.000	66.000	55.000	218.35	3.97

Term : Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	540G	LW	PRETRIAL CIVIL LITIGATION	A	3.000	12.00		
LAW	571Q	LW	PUBLIC INTEREST EXT WORKSHOP	CR	1.000	0.00		
LAW	574C	LW	INDEPENDENT WRITTEN WORK	A	1.000	4.00		
LAW	579B	LW	EXTERNSHIPS	CR	4.000	0.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	4.000	16.00	4.00
Cumulative	76.000	76.000	76.000	59.000	234.35	3.97

Term : Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	540T	LW	MARYLAND CRIMINAL LAW PRACTICE	A	3.000	12.00		
LAW	569S	LW	BAR EXAM PREPARATION COURSE	CR	3.000	0.00		
LAW	572C	LW	BUSINESS ASSOCIATIONS	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	9.000	9.000	9.000	6.000	24.00	4.00
Cumulative	85.000	85.000	85.000	65.000	258.35	3.97

Transcript Totals

Transcript Totals - (School of Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	85.000	85.000	85.000	65.000	258.35	3.97
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	85.000	85.000	85.000	65.00	258.35	3.97

June 14, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am an Associate Professor at the University of Maryland Carey School of Law enthusiastically writing to recommend Kathryn Baxter (class of '23) for a clerkship in your chambers. I had the pleasure of having Kathryn in my Contracts class in Fall 2020. Because of her exceptional class performance in Contracts, I hired her as my research assistant and have kept in touch over the years. Due to the small class size of my Contracts class and the highly interactive nature of the research assistant job, I can offer a unique perspective on Kathryn's potential as a law clerk. Kathryn is currently ranked #1 in her class in the evening division (with a GPA of 3.97). She is brilliant, mature, hard-working, and humble. She would make a dream law clerk.

Kathryn is an intellectual powerhouse. Despite having my Contracts class over Zoom due to the pandemic, Kathryn was an active participant. Her reading of case law was always precise and careful. Her law school exam was among the very best I have seen while teaching at the University of Maryland. Her achievement is particularly impressive given that she is going to law school while holding down a full-time job as a Senior Policy Analyst at the Institute for Innovation and Implementation, University of Maryland Baltimore School of Social Work. Kathryn is currently enrolled in my Business Association class, where she is a star participant.

Kathryn will hit the ground running from day one as a law clerk in federal court. She has already been selected as a law clerk for Justice Angela M. Eaves of the Supreme Court of Maryland in the 2023-24 term. That clerkship will enrich an already impressive level of legal research and writing skills. Kathryn's work product is already as good as a junior associate at a major law firm. Because of Kathryn's intellectual potential, I hired Kathryn as a research assistant. Despite not taking Business Associations at the time (she is interested in a career in public interest law), she was able to produce work product equivalent to ones I would get from a junior associate at a major law firm specializing in corporate law. For instance, her most recent legal memo examined the contours of board oversight liability under Delaware corporate law. The law permits shareholders to hold corporate directors personally responsible for liability based on their failure to oversee the operation of the company in good faith. This is a notoriously murky area of the law that confuses even the most seasoned litigators. Kathryn synthesized decades of case law and offered a doctrinally sound assessment of the current landscape, while emphasizing areas that remain open questions. Her research is comprehensive and her writing is a joy to read. It is the kind of legal memo I would review from the best first-year associates while I was in private practice in New York City.

On a personal note, Kathryn is empathetic, thoughtful, and mature. I have had numerous occasions to talk with her in person (through office hours, coffee, and a public interest auction dinner I hosted), and always found her incredibly pleasant and humble. She is also genuinely committed to the public interest, as evidenced by her wide-ranging work experience working for the University of Maryland's School of Social Work and the School of Medicine. Despite the fact that she could have secured high-paying law firm jobs, she remains focused on pursuing a job that would serve the public interest. I think she'll be a superstar lawyer. As a former law clerk to a federal judge, I know she is the kind of colleague that I would want to work within a tight-knit work setting.

I recommend Kathryn to be your law clerk with no reservations. If you would like additional information regarding Kathryn, please do not hesitate to contact me at 203.392.4466 (cell) or at wmoon@law.umaryland.edu. I would be delighted to chat with you further about Kathryn. Thank you for your time and consideration.

Very truly yours,

William J. Moon
Associate Professor of Law
University of Maryland School of Law

Kathryn Baxter Writing Sample – Cover Sheet

Please note: This writing sample is based on an actual Maryland Circuit Court case. In this writing sample, names and certain details have been omitted to protect confidentiality.

Kathryn Baxter Writing Sample

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

APRIL TERM, 2022

NO. 1331

R.M.,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(THE HONORABLE SYLVESTER B. COX PRESIDING)

APPELLEE'S BRIEF

[Statement of the Case omitted for the purposes of this writing sample]

QUESTIONS PRESENTED

1. Did the trial court correctly decide under *McKnight v. State*, 280 Md. 604 (1977), to join an obstruction of justice charge and arson-related charges when the anticipated testimony demonstrated that the arson was the motive for the actions to obstruct justice and the actions to obstruct justice demonstrated consciousness of guilt for the arson?

2. Did the trial court correctly decide under Maryland Rule 5-803(b)(2) and *Gordon v. State*, 431 Md. 527 (2013), that witness statements were admissible as excited utterances when it factually found that the statements "appear to have been made under the stress of the incident occurring at the time"?

SUMMARY OF FACTS[1]

Baltimore police officer Officer H. arrived at an early morning fire and spoke to witnesses at the scene. (T2 99-100, 103).[2] One of the witnesses he spoke to, Ms. J., stated that

[1] For the purposes of this writing sample, the Statement of Facts has been condensed into a brief Summary of Facts.
[2] Transcript references are as follows: "T1" for the Oct. 31, 2012 pre-trial motions hearing; "T2" for the Nov. 1, 2012 trial transcript; "T3" for the Nov. 2, 2012 trial transcript; "T4" for the Nov. 5, 2012 trial transcript; and "T5" for the Nov. 7, 2012 trial transcript.

she had had a "clear, unobstructed view" (T2 102) of the man who had set the fire and identified the appellant, R.M., as the arsonist. (T2 102). The other witness, Ms. K., told him that her ex-boyfriend, R.M., had threatened to kill her if she ever tried to leave him. (T2 110). Ms. K. also told the officer that R.M. had been stalking her since their breakup. (T2 110).

Ms. K. testified that soon after the fire, R.M. contacted her to offer her six months' rent and other support on the condition that she no longer cooperate with the prosecutor's office. (T3 149–50). Ms. K. signed a lease for a new apartment across town and Mr. M. paid $4,800 in cash for the unit. (T3 152). Afterwards, Ms. K. cut off contact with the prosecuting attorney, going so far as to throw out her phone on R.M.'s orders and enrolling her son in a new, private school to avoid being tracked. (T3 153–54, 156).

ANALYSIS

I. THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION TO JOIN THE CASES BECAUSE IT CORRECTLY FOUND THAT THE EVIDENCE WAS MUTUALLY ADMISSIBLE BASED ON THE RELEVANCE OF THE EVIDENCE AND THAT THE INTERESTS IN JUDICIAL ECONOMY OUTWEIGHED THE MINIMAL PREJUDICE TO THE APPELLANT.

The trial court's joinder decision was proper because the interests in judicial economy advanced by joining charges with mutually admissible evidence outweigh any argument of prejudice to the appellant. First, the trial court correctly found that the evidence of the two crimes was mutually admissible; the obstruction of justice evidence was relevant to the arson case based on consciousness of guilt and the arson evidence was admissible in the obstruction of justice case based on motive. In its argument regarding mutual admissibility, the appellant incorrectly weighed the factors of prejudice versus *probative value*, rather than the factors relevant to mutual admissibility, prejudice versus *judicial economy*. (Appellant's Brief at 9; *Solomon v. State*, 101 Md. App. 331, 346–47 (1994)). Because the evidence was mutually admissible, the decision to join or sever the cases was left to the judge's discretion. Md. Rule

4-253. The trial judge properly exercised his discretion to join the cases because the significant interests in judicial economy outweighed the minimal prejudice to the appellant.

[Procedural facts omitted for the purposes of this writing sample]

Under the Maryland Rules, the severance or joinder of multiple charges is left to the discretion of the trial judge. Md. Rule 4-253. The first step of the joinder analysis is to consider whether the evidence is mutually admissible, that is, whether "evidence of each charge [would] be admissible in a separate trial of each other charge."[3] *Conyers v. State*, 345 Md. 525, 549 (1997). Generally, so-called "other crimes" evidence is inadmissible, Md. Rule 5-404(b), but a judge may determine that evidence of one crime has a "substantial relevance" to the other(s) such that it should be considered mutually admissible. *Solomon*, 101 Md. App. at 351. There are a wide range of specific exceptions under which a judge may find that such relevance exists; these exceptions include motive, intent, absence of mistake, a common scheme or plan, identity, and consciousness of guilt. Md. Rule 5-404(b); *Ross v. State*, 276 Md. 664, 669–70 (1976); *Solomon v. State*, 101 Md. App. 331, 353–55 (1994). However, because the focus is on relevance, this list of exceptions is not exhaustive; the list is "always capable of expansion wherever a clear instance of relevance might arise that somehow fails to fit neatly into one of the pigeonholes." *Anaweck v. State*, 63 Md. App. 239, 257 (1985), *overruled on other grounds by Wynn v. State*, 351 Md. 307, 315 n.4 (1998).

When a judge finds that the evidence is mutually admissible based on one or more exception, the court's second and final step of the joinder analysis is to weigh the interests in judicial economy and efficiency against the prejudice of joinder to the defendant. Md. Rule 4-253(c), *McKnight v. State*, 280 Md. 604, 609–10 (1977). The interests in judicial economy are

[3] Whether evidence is mutually admissible is a legal conclusion that an appellate court reviews de novo. *Bussie v. State*, 115 Md. App. 324, 332 (1997).

typically so weighty that, once a judge finds mutual admissibility, "any judicial economy that may be had will usually suffice to permit joinder . . . ." *Conyers v. State*, 345 Md. 525, 556 (1997).

When a court finds that evidence of another crime is relevant based on consciousness of guilt or motive, that evidence establishes the mutual admissibility that is necessary for joinder. For example, in *Conyers v. State*, the Court of Appeals considered the mutual admissibility of evidence of two separate murders, the second of which was allegedly carried out to eliminate the only witness to the first. *Id.* at 553. The court held that the evidence in the two murders was mutually admissible—the evidence of the first murder was relevant to the second because it showed the motive and the evidence of the second murder was relevant to the first because it showed a consciousness of guilt for the first murder. *Id.* at 554–55. Based on this decision that the evidence was mutually admissible, the court also found no other substantial interests weighing against joinder and ultimately held that the decision to join the cases was not an abuse of discretion. *Id.* at 556.

Once a court finds that evidence is mutually admissible, the only remaining inquiry is whether the prejudice to the defendant is so substantial that it should outweigh the interests in judicial economy and efficiency. Because these latter interests are so significant,[4] Maryland court decisions to overturn a joinder motion most often rest on an incorrect decision regarding *mutual admissibility*, rather than an abuse of discretion in *weighing the interests*. *See, e.g.*, *State v. Edison*, 318 Md. 541, 565 (1990) (reversing a lower court decision because it abused its discretion in applying the mutuality of evidence test because it found evidence of crimes were mutually admissible when they, in fact, would not be necessary to prove the crime at issue, but not basing its decision on weighing the prejudice against judicial economy).

[4] "[S]ociety . . . is not required to bankrupt itself in order to indulge one indicted for crime with every tactical edge he might desire. Whatever the issue, cost always matters." *Solomon*, 101 Md. App, at 379.

The trial court in this case correctly found that the evidence in the two cases was mutually admissible—the obstruction of justice evidence was admissible in the arson case based on its relevance as consciousness of guilt and the arson evidence was admissible in the obstruction of justice case based on its relevance as motive. Regarding the former, the State demonstrated that, within weeks of the arson, Mr. M. tracked down Ms. K. to convince her to stop cooperating with the police. (T3 150). As in *Conyers*, where the court held that commission of a second crime to cover up an earlier one was admissible as consciousness of guilt evidence, here, the State offered evidence of a second crime (obstruction of justice) that attempted to cover up the first (arson) as consciousness of guilt evidence. The State provided ample evidence that Mr. M. engaged in actions to prevent Ms. K. from cooperating with the police, including paying $4,800 in rent for an apartment where it would be harder for the prosecutors to find her. (T3 151). In fact, the State pointed out that it had shared the obstruction of evidence prior to its joinder motion because "it was always the State's intention to include all of this evidence in the arson case." (T1 22). This action underlines the point that the evidence should be considered mutually admissible because the State was planning to admit the evidence of obstruction regardless of whether the cases were joined.

The evidence is also mutually admissible because the arson evidence was relevant to the obstruction of justice case based on motive. Again, as in *Conyers*, where the court held that evidence of the initial crime was relevant as a motive for the second crime, the arson provides the jury with a plausible reason why Mr. M. would go through such lengths to persuade Ms. K. to stop cooperating with police. Thus, because evidence of each crime would be admissible in the trial of the other based on their respective special relevance, the trial court was correct to find that the evidence was mutually admissible.

While the appellant takes great pains to identify specific pieces of evidence that would not be mutually admissible in a trial for the other crime,[5] this level of analysis is neither necessary, nor the best way to assess mutual admissibility. Because the definition of "relevant evidence" is rather broad ("evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"), Md. Rule 5-401, once the State established that evidence that the appellant committed the arson was "of consequence" to deciding the jury's determination that he obstructed justice, evidence that had "any tendency" to make the existence of those facts more or less probable can be admitted. *Id.* It is unnecessary to quibble over individual pieces of testimony when the State has proven, consistent with case law, that the special relevance required for mutual admissibility exists in both directions.

Because the decision to join cases when the evidence is mutually admissible is within the trial court's discretion, this Court should not find an abuse of that discretion unless the prejudice to the defendant is substantial enough to balance against judicial economy—the "heavy counterweight on the joinder/severance scales." *Solomon*, 101 Md. App at 346. Here, the appellant argues that joinder was prejudicial because it exposed the jury to additional evidence of Mr. M.'s bad character (e.g., encouraging Ms. K. to lie on the rental application). However, this *unfavorable* evidence is not the same as the *unfairly prejudicial* evidence encompassed by the rule, and it is certainly not substantial enough to outweigh the court's interests in judicial economy. Because this balancing does not favor the appellant, this Court should uphold the trial court's joinder decision.

[5] *See, e.g.,* Appellant's Brief at 5.

II. THE TRIAL COURT CORRECTLY ADMITTED TESTIMONY UNDER THE EXCITED UTTERANCE HEARSAY EXCEPTION BASED ON ITS FACTUAL FINDINGS THAT THE STATEMENTS WERE MADE "UNDER THE STRESS OF THE INCIDENT OCCURRING AT THE TIME."

The trial court correctly admitted Officer H.'s statements because the court relied on its factual findings that the speakers were emotionally excited at the time to arrive at its legal conclusion that the statements were excited utterances. While the appellant urges this Court to make its own factual findings regarding, e.g., the spontaneity of the statements, Maryland case law is clear that appellate courts must defer to the trial court's factual findings in analyzing the admission of hearsay, only reversing those findings in cases of clear error. *Gordon v. State*, 431 Md. 527, 538 (2013). There is no clear error in this case—the court factually found that the statements were "made under the stress of the incident occurring at the time." (T2 35). Based on this finding, the court directly applied the Maryland Rule regarding hearsay exceptions to reach the legal conclusion that the statements should be admitted as excited utterances. Md. Rule 5-803(b)(2). Additionally, regardless of this Court's assessment of the trial court's analysis, the decision does not merit reversal because the admission of the statements was harmless. Nearly all of the statements' contents were admitted through other unchallenged evidence and the two remaining unique statements were so insignificant that the jury could not have relied upon them in coming to its verdict. For these reasons, this Court should affirm the trial court's decision to admit Officer H.'s testimony regarding the excited utterances.

[Procedural facts omitted for the purposes of this writing sample]

While hearsay is generally not admissible as evidence, Md. Rule 5-802, the Maryland Rules allow for numerous exceptions. Md. Rules 5-802.1–5-804. One such exception is the "excited utterance," which is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Md.

Rule 5-803(b)(2). In determining whether a statement is an excited utterance, time is a "primary consideration," though the court considers other factors within the totality of the circumstances as well. *State v. Harrell*, 348 Md. 69, 77 (1997). A short lapse in time between the exciting event and the resulting statement is suggestive of the statement's spontaneity and the speaker's emotional engulfment and, it follows, credibility. *Deloso v. State*, 37 Md. App. 101, 106 (1977). Determining whether hearsay is admissible usually requires both factual and legal determinations. *Gordon*, 431 Md. at 536. While the ultimate admissibility decision is reviewed de novo on appeal, the trial court's factual findings supporting its legal conclusion can only be reversed for clear error. *Id.* at 538.

For excited utterances (and other hearsay exceptions), the speaker's state of mind (i.e., whether they are "excited") is a factual determination that is granted considerable deference on appeal. *Id.* at 536–37. For example, in *Gordon v. State*, the trial court factually found the defendant had tacitly admitted his name and date of birth by handing over his driver's license; the court subsequently came to the legal conclusion that those facts were admissible under the party-opponent statement exception. *Id.* at 541. The Court of Appeals found no clear error in the trial court's finding of fact that the defendant had "manifested an adoption or belief in the truth of the date of birth listed on the license" based on the testimony and upheld the court's legal conclusion because it was based on a "straightforward application" of the Maryland Rule regarding statements by a party-opponent. *Id.* at 549; Md. Rule 5-803(a)(2).

Here, the trial court made a factual finding on the record that supports the legal conclusion that the statements to Officer H. were excited utterances. In considering the motion to admit the testimony, the court found on the record that "these statements appear to have been made under the stress of the incident occurring at the time" before granting the State's motion to admit the statements. (T2 35–36). This factual finding was based on the State's representation that Officer H.'s testimony would establish that the fire was still

burning at the time of the statements, that the speakers were emotionally engulfed, and that the speakers were "relaying information that law enforcement was using to address the ongoing emergency." (T2 29). The court noted that the fire was still burning at the time of the statements and stated that the situation was "a classic case of an excited utterance [given that] the startling event was occurring at the time." (T2 34). The judge also made it clear when he granted the motion that he would be listening closely to the testimony to ensure the State laid the appropriate foundation for these facts. (T2 36).

As proffered during the pre-trial arguments, Officer H.'s testimony did establish that the fire was still burning during the statements,[6] the speakers were emotionally engulfed,[7] and the speakers were sharing information with law enforcement related to the emergency.[8] Because the court's factual finding was supported by this evidence on the record, it cannot be considered clear error and this Court must defer to this finding in its application to the legal issue of whether the testimony was admissible.

Based on its factual finding, the trial court correctly concluded that Ms. J.'s and Ms. K.'s statements were admissible as excited utterances. As in *Gordon*, where the lower court's factual finding that the defendant "manifested an adoption or belief in the truth" of the information on the license allowed for a "straightforward application" to the Maryland Rule regarding statements of a party-opponent,[9] the court's application of the factual finding to the

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[6] E.g., "Q: Now, at the time that you had conversation with [Ms. J.], was the fire still burning? A: The fire was still active, yes." (T2 100). "Q: Was the fire still burning when you had the conversation with Ms. [K.]? A: Yes, the fire was still active." (T2 103).

[7] E.g., "She [Ms. J.] was panicked. Her speech was quick but precise, uh, she seemed a bit fearful . . . ." (T2 100). "When I came to Ms. [K.], she was kind of, I guess in a state of shock. She was kind of guarded." (T2 103).

[8] For example, Ms. J. described to Officer H. what she heard and saw as the fire began, including a description of the person she saw, which could be used to identify as suspect. (T2 101). Ms. [K.] told the officer that everyone in the house had made it out. (T2 110).

[9] "A statement of which the party has manifested an adoption or belief in its truth" is not excluded by the hearsay rule. Md. Rule 5-803(a)(2).

law in Mr. M.'s case is similarly straightforward. The Maryland Rules state that "a *statement* relating to a startling event or condition *made* while the declarant was *under the stress of excitement caused by the event or condition*" is not excluded by the general hearsay rule. Md. Rule 5-803(b)(2) (emphasis added). The judge's factual findings established that "these *statements* appear to have been *made under the stress of this incident* occurring at the time that it was occurring and may have still been going on, I don't know." (T2 35) (emphasis added). Accepting the trial court's factual finding (which this Court must do since there is no clear error in the finding), this Court must come to the same legal conclusion as the trial court that the statements were admissible as excited utterances under Maryland Rule 5-803(b)(2).

Irrespective of the analysis above, the appellant still does not prevail on this issue because the admission of Officer H.'s statements was harmless error. If there is no reasonable possibility that the fact finder would have relied on the evidence in reaching a guilty verdict, the error is harmless and the decision should be upheld. *Dorsey v. State*, 276 Md. 638, 659 (1976). Here, the majority of the evidence the appellant argues was inadmissible is cumulative; the substance of the excited utterances is already captured in Officer H.'s police report, Ms. J.'s and Ms. K.'s testimonies, and/or the content of Ms. J.'s 9-1-1 calls. The two remaining statements not admitted through other evidence are unrelated to the appellant's guilt (e.g., the fact that he drove a certain model car). Because this Court can find beyond a reasonable doubt that the jury was not influenced by Officer H.'s testimony about the statements in arriving at its verdict, the trial court's decision to admit them must be treated as harmless error.

Errors in the admission of hearsay are subject to a harmless error analysis. *Frobouck v. State*, 212 Md. App. 262, 283 (2013). Harmless error review is based on the understanding that "[a]n accused 'has a constitutional right to a "fair trial" but not necessarily to that seldom experienced rarity, a perfect trial.'" *Bryant v. State*, 129 Md. App. 150, 161 (1999) (quoting

State v. Babb, 258 Md. 547, 552 (1970)). An error is considered harmless if, based on the record, a reviewing court can declare beyond a reasonable doubt that the error in no way influenced the verdict. *Dorsey*, 276 Md. at 659. In making this assessment, courts consider whether excluded evidence "tends to prove the same point as other evidence presented." *Dove v. State*, 415 Md. 727, 744 (2010). It is harmless error to admit evidence, even evidence incorrectly admitted over an objection, if the same evidence is later admitted without objection. *Linkins v. State*, 202 Md. 212, 224 (1953).

For example, in *Johnson v. State*, the Court of Special Appeals held that the lower court had incorrectly admitted testimony from a detective that contained hearsay. 23 Md. App. 131, 136 (1974). The court determined that the statement was not harmless because the hearsay testimony contained the *only* statement (other than a previous statement made by the appellant which was "strenuously and repeatedly challenged" at trial) that put the appellant at the scene of the crime. *Id.* at 137. Because the decision was erroneous and the error was not harmless, the court reversed and remanded the case. *Id.* at 139.

In Mr. M.'s case, the information he seeks to exclude as hearsay is harmless because almost all of it is cumulative. All of the substantive information that Officer H. testified to about Ms. J.'s statement (see Table 1) and nearly all the information that he testified to about Ms. K.'s statement after escaping the fire (see Table 2) was presented through other evidence during the trial. The defense did not challenge the admissibility of these other pieces of evidence. The 9-1-1 call was admitted without objection as a business record. (T2, 8). Officer H.'s police report was disclosed to defense counsel and there are no objections in the record to the admission of this report. (T2 28). Of the many objections the defense made during Ms. J.'s testimony, none were regarding content covered in Officer H.'s testimony. The only defense objection during Ms. K.'s testimony that overlapped with the content of Officer H.'s testimony

was regarding Mr. M.'s threat to firebomb her house, T3 135, and that objection was about the State's attempt to impeach its own witness rather than the admissibility of the statement itself. (T3 136–38). Unlike in *Johnson*, where the court found that the admission of a statement was prejudicial because it was essentially the only evidence connecting the defendant to the scene of the crime, in this case, nearly all the facts admitted as excited utterances were presented to the fact finder through other evidence. Therefore, following the rule from *Linkins*, it is harmless error to admit Officer H.'s testimony, regardless of whether it should have been excluded, because the evidence was later admitted without objection.

There are only two statements in Officer H.'s testimony about the excited utterances that were not offered through other evidence, but neither statement impacts the outcome of the case. First, Officer H. testified that Ms. K. told him that Mr. M.'s wife might be at his home. (See Table 2, row 6 and footnote; T2 111). Ms. K. did not specifically testify to telling Officer H. that Mr. M. lived with his wife. However, Ms. K. did acknowledge that Mr. M. was married at several points in her testimony,[10] so any prejudice to the appellant regarding his extramarital activities would have occurred regardless of whether Officer H.'s testimony was excluded.

Ms. K.'s testimony was also inconsistent with Officer H.'s testimony regarding the type of car that Mr. M. had driven by the house the previous day. (See Table 2, row 4). Officer H.'s testimony states that Ms. K. told him it was a Cadillac Escalade, T2 100, while Ms. K. testified that it was a Lexus convertible.[11] (T3 119). This testimonial inconsistency is exactly the type encompassed within the "harmless error" doctrine—the remedy for erroneous

[10] "Q: Why did you lie? A: Because he told me not to tell nobody . . . because he's married." (T3 109). "A: Yes, he would drive his wife's car . . . ." (T3 111). "Q: Why didn't Mr. [M.] park there [in front of the residence] if you know? A: He didn't want his wife or anybody else to see his car." (T3 112).
[11] Ms. K. also testified that Mr. M. frequently drove different cars. (T3 111).

admission of an unimportant fact cannot be reversal and retrial.[12] If anything, this minor inconsistency played to the appellant's advantage during the trial. In its closing arguments, the defense highlighted confusion over the make of the vehicles to portray a flawed investigation and/or fabricated statements by neighbors:

> [A]fter Officer [H.] interviewed Ms. [K.] and interviewed Ms. [J.], he put out a call for other officers to canvas the scene for a black Cadillac Escalade. Did you catch that? He never asked for anybody to be on the lookout for this black Lexus that they all claimed that they saw at the eleventh hour.

(T4 287–88). By comparison, the State made no reference to the make or model of the car that Mr. M. was driving when he passed Ms. K's home the day before the fire—only that "an altercation" took place when he drove by. (T4 241). The respective sides' uses of these facts demonstrate that, at worst, the inconsistency is harmless and, at best, the inconsistency provided additional material for the defense's argument. Either way, this Court should find that beyond a reasonable doubt, the jury relied on neither the appellant's marital status nor the make of the vehicle he was driving the day before the fire in coming to its guilty verdicts.

The admission of Officer H.'s testimony regarding the excited utterances was harmless error. Most of the information contained in the statements was already admitted through other evidence and the remaining two statements were so insignificant that it is beyond a reasonable doubt that the jury would not have relied on them in finding the appellant guilty of arson, seven counts of reckless endangerment, and other charges. Because admission of the evidence was harmless error, this Court should decline to reverse the decision of the trial court.

CONCLUSION

For the reasons stated in the Argument section above, the appellee respectfully requests that this Court affirm the judgement of the court below.

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[12] "[W]hen courts fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels of technicality."'" United States v. Hasting, 461 U.S. 499, 509 (1983) (quoting Roger J. Traynor, *The Riddle of Harmless Error* 14 (1970)).

Table 1. Cumulative evidence for Ms. J.'s statements to Officer H. that the appellant seeks to exclude as hearsay

	Statement appellant challenges as hearsay	Cumulative evidence for the challenged statement
1	"Wide awake and she had heard a noise outside next door" (T2 101).	**Ms. J.'s testimony:** "I hadn't been to sleep at all . . . I hear[d] a large bang." (T2 169-70). **Officer H.'s police report:**[13] "I was wide awake. I came to the door because I heard a loud noise." (T2 30).
2	"She heard a loud explosion and she seen a man that she knew as [R.M.]." (T2 101).	**Ms. J.'s testimony:** "I hear[d] a large bang . . . I see the defendant standing on the sidewalk by [address omitted] with a gas can and the porch next door to me is on fire . . . ." (T2 170-71). **9-1-1 call, Ms. J.'s testimony:** "I told the 9-1-1 operator who I saw leaving the scene." (T2 183). **Ms. J.'s testimony:** "Q: What name [did] you [give] the police when you called [9-1-1] as the person who you saw start the fire? . . . A: [R., R. M.]" (T2 184). **Police report:** "I knew the suspect was [R.]" (T2 30).
3	"She knew it was [R.M.] . . . because she had previously seen him come to the house. . . [he] was the boyfriend of her next door neighbor." (T2 102).	**Police report:** "I knew the suspect was [R.]. I knew that [R.] was the boyfriend of Ms. [K.]." (T2 30). **Police report:** "She also said, "And Ms. [K.], the neighbor, is the girlfriend." (T2 30). **Ms. J.'s testimony:** "Q: Had you ever met [R.M.]? A: Yes . . . I was outside and he was on the porch and introduced myself." (T2 131). She saw Mr. [M.] at [address omitted] Norfolk Avenue "two, three times a week." (T2 132).
4	"She said she seen [R.M.] running away from the house towards the sidewalk..." (T2 101).	**Ms. J.'s testimony:** "He ran down the sidewalk." (T2 172). **Police report:** "He looked at me . . . and then he ran, fled down towards Granada [Avenue]." (T2 30).
5	"She described him as wearing a burgundy shirt and that he was carrying a red gas can . . ." (T2 101).	**Ms. J.'s testimony:** The defendant was wearing "a maroon ribbed t-shirt, black shorts, black leather sandals" and he was holding a "five gallon gas can with a yellow top open." (T2 178). **Police report:** "He was carrying a red gas can with a yellow spouted cap." (T2 30).
6	"She yelled out to him by name . . . he turned around in which she had a clear, unobstructed view of him." (T2 102).	**Ms. J.'s testimony:** "I yell at him and he looks at me." (T2 171). She could see the defendant "very clearly . . . because of the glowing fire . . . it lit up like daylight." (T2 183). **Ms. J.'s testimony:** "He turned and looked at me. We made eye contact." (T2 177). **Police report:** "He [R.M.] looked me and then I saw him clearly." (T2 30).
7	He "continued running down Norfolk." (T2 102).	**Police report:** "He ran, fled down towards Granada [Avenue]."[14] (T2 30). **Ms. J.'s testimony:** "He ran down the sidewalk." (T2 172).

[13] The State proffered statements from Officer H.'s police report during pre-trial deliberations on the excited utterance issue. (T2 30).
[14] Granada Avenue is a cross street to Norfolk Avenue. (T2 91).

Table 2. Cumulative evidence for Ms. [K.]'s statements to Officer H. that the appellant seeks to exclude as hearsay

Statement appellant challenges as hearsay		Cumulative evidence for the challenged statement
1	"She had broken up with her ex-boyfriend at the time, [R.M.]." (T2 110, 115).	**Ms. K.'s testimony:** "We were no longer together [at the time of the fire]." (T3 117).
2	"[R.M.] stated that he would kill her if she ever tried to leave him." (T2 110).	**Ms. K.'s testimony:** "Q: In prior conversations with detectives, did you suggest that . . . Mr. [M.] had said . . . if you leave him, he would fire bomb your house? . . . A: Yes, that was part of it." (T3 138).
3	"[R.M.] had been stalking her since the breakup . . . he was driving down Norfolk past her house the day prior on the 28th." (T2 110).	**Ms. K.'s testimony:** "The day before the fire he came through my street . . . I screamed at him that it was over . . . why does he keep coming back trying to bother me, I'm done, please leave me alone." (T3 120). **Ms. K.'s testimony:** "He would drive through the area very many times, if we were broken up or not. He always had a way of always driving past." Following the breakup, he drove past "maybe twice a week." (T3 121).
4	The car [R.M.] was driving the day before was a black Cadillac Escalade.[15] (T2 110).	N/A. See footnote 15.
5	"She provided me with an address of where he might possibly be headed [his home]." (T2 110).	**Ms. K.'s testimony:** "I told [Officer P.] that he does live at 3616 Belmore Road." (T3 145).
6	There might be guns and his wife[16] at that residence. (T2 111).	**Ms. K.'s testimony:** "I told [Officer P.] that Mr. [M.] could be armed and dangerous because he has brought guns to my house and left them on my table." (T3 145).

[15] The statement that Mr. M. was driving a Cadillac Escalade was not admitted through other evidence. In Ms. [K.]'s testimony, she identifies the vehicle he was driving the day before as a Lexus convertible. (T3 119).

[16] The statement that Mr. M.'s wife may have been at the residence at the time was not admitted through other evidence, though testimony that Mr. M. was married was. (T3 112).

Applicant Details

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Applicant Education

BA/BS From	**University of North Texas**
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Date of JD/LLB	**May 15, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Gender and Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court** **Williams Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 11, 2023

The Honorable Tanya S. Chutkan
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am a graduate of Columbia Law School, a Harlan Fiske Stone Scholar, and an outgoing Production Editor of the *Columbia Journal of Gender and Law*. I will start work this upcoming fall as an associate attorney in New York City for Paul, Weiss, Rifkind, Wharton & Garrison LLP.

I write to apply for a clerkship in your chambers for the 2024-2025 term or any later term. I am interested in clerking for you because of your experience in the public and private sectors prior to becoming a judge. I may navigate both sectors in the future and would like to learn from a judge who has the experience.

I think my background makes me an ideal candidate for the position. During my rising-2L summer, I served as an intern to Chief Judge Margo K. Brodie of the Eastern District of New York. I believe this experience prepared me to serve as a law clerk in your chambers because I worked closely with Judge Brodie and her clerks in drafting bench memorandums and summary orders. Additionally, in my last semester of law school, I participated in the Appellate Advocacy Seminar taught by Judges Gerard Lynch and Michael Park of the Second Circuit. This experience allowed me to engage with appellate arguments and briefs, and it provided an opportunity to learn about persuasive writing and oral argument.

Enclosed please find my resume, law school transcript, and writing sample. Also enclosed are letters of recommendation from Professor Jamal Greene of Columbia Law School ((212) 854-5865, jamal.greene@law.columbia.edu); Professor Alexandra B. Carter of Columbia Law School ((646) 660-0627, acarte1@law.columbia.edu); and Beth Shane of Patterson Belknap Webb & Tyler LLP ((212) 336-2659, eshane@pbwt.com).

Thank you for your consideration. Should you require any additional information, please do not hesitate to contact me.

Respectfully,

Brenton Browne

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EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D., received May 2023
Honors: Best in Class, Constitutional Law
Harlan Fiske Stone Scholar
Carol B. Liebman Mediation Prize
Columbia Anti-Racism Grant Recipient

Activities: Black Law Students Association, Paul Robeson Gala Chair
Black Men's Initiative at CLS, Co-President
First Generation Professionals
Journal of Gender and Law, Production Editor
Legal Practice Workshop, Teaching Assistant
Mediation Clinic
Moot Court Coach, Williams Moot Court
Student Senate, Parliamentarian
Williams Moot Court, Top Oral Advocate, Northeastern Regional

UNIVERSITY OF NORTH TEXAS, Denton, TX
B.A., *magna cum laude*, received May 2018
Major: Political Science
Honors: Outstanding Student in Political Science
Activities: Moot Court Team
Phi Alpha Delta Law Fraternity, International
Study Abroad: Council on International Educational Exchange; Berlin, London, Paris, Fall 2016
Cape Town, South Africa, Summer 2017

EXPERIENCE

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY May 2022– July 2022
Summer Associate
Researched various legal issues and drafted memoranda. Observed oral arguments and hearings.

United States District Court, Eastern District of New York, Brooklyn, NY June 2021– July 2021
Intern to the Hon. Chief Judge Margo K. Brodie
Drafted memoranda and order opinions. Conducted legal research and document review.
Observed oral arguments and hearings.

Bowdich & Associates, PLLC, Dallas, TX June 2018 – July 2020
Paralegal
Researched debt collection, bankruptcy, and complex civil litigation questions. Responded to client inquiries. Prepared trial and deposition binders. Coordinated schedules of multiple attorneys and calendared all deadlines. Managed incoming and outgoing finances through QuickBooks.

University of North Texas, Denton, TX January 2018 – May 2018
Teaching Assistant to Professor King
Managed daily operations of class of five hundred political science students. Responded to student questions and concerns related to syllabus. Assisted in preparing examination questions. Proctored exams and graded assignments.

INTERESTS: Classic films, working out, traveling

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05/18/2023 00:37:58

Program: Juris Doctor

Brenton James Howard Browne

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9262-1	Advanced Mediation Clinic	Price, Rebecca	4.0	A
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	B
L6625-1	Journal of Gender and Law		0.0	CR
L9117-1	S. Advanced Legal Research Techniques	Yoon, Nam Jin	2.0	A-
L8660-1	S. Appellate Advocacy	Lynch, Gerard E.; Park, Michael	3.0	A-

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9262-1	Advanced Mediation Clinic	Carter, Alexandra	4.0	A
L6241-2	Evidence	Capra, Daniel	4.0	B+
L6425-1	Federal Courts	Metzger, Gillian	4.0	B+
L6625-1	Journal of Gender and Law		0.0	CR
L6680-1	Moot Court Stone Honor Competition [Minor Writing Credit - Earned]	Bernhardt, Sophia	0.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6867-1	Independent Moot Court Coaching	Bernhardt, Sophia	1.0	CR
L6625-1	Journal of Gender and Law		0.0	CR
L6169-3	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A-
L9239-1	Mediation Clinic	Carter, Alexandra	4.0	A-
L9239-2	Mediation Clinic - Fieldwork	Carter, Alexandra	3.0	CR
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Goshen, Zohar	4.0	A-
L6867-1	Independent Moot Court Coaching	Bernhardt, Sophia	1.0	CR
L7990-1	Introduction to Intellectual Property Law	Balganesh, Shyamkrishna	4.0	B+
L6625-1	Journal of Gender and Law		0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6274-2	Professional Responsibility	Gupta, Anjum	2.0	A
L6674-1	Workshop in Briefcraft [Major Writing Credit - Earned]	Bernhardt, Sophia	2.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6184-1	Law and Neoliberalism	Thomas, Kendall	3.0	B+
L6130-4	Legal Methods II: Social Justice Advocacy	Franke, Katherine M.	1.0	CR
L6121-31	Legal Practice Workshop II	Sherwin, Galen L.	1.0	HP
L6116-4	Property	Purdy, Jedediah S.	4.0	B
L6118-1	Torts	Merrill, Thomas W.	4.0	B+
L6874-1	Williams Institute Moot Court	Sherwin, Galen L.; Strauss, Ilene	0.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	B
L6133-6	Constitutional Law	Greene, Jamal	4.0	A+
L6105-3	Contracts	Emens, Elizabeth F.	4.0	B+
L6113-4	Legal Methods	Briffault, Richard	1.0	CR
L6115-6	Legal Practice Workshop I	Bernhardt, Elizabeth Farber; Izumo, Alice	2.0	HP

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 83.0

Total Earned JD Program Points: 83.0

Best In Class Awards

Semester	Course ID	Course Name
Fall 2020	L6133-6	Constitutional Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	3L
2021-22	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0

June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am pleased to write to you in very strong support of Brenton Browne's application for a judicial clerkship in your chambers. I am a Clinical Professor of Law at Columbia Law School, where I serve as Director of the Mediation Clinic and the outgoing Chair of the Law School's Clerkship Committee.

In summary: Brenton is an outstanding student (even among outstanding students), a superlative mediator and colleague, and an accomplished expert in the dispute resolution field, to whom diplomats, judges and prominent academics have turned for advice.

Because I am in a unique position to be able to comment on Brenton's academic work as well as his abilities as a colleague—both of which will be relevant to you in your clerkship decisions—I will address each in turn below.

By way of background: against a very competitive field, I selected Brenton as one of ten students for my Spring 2022 Mediation Clinic, in which he mediated cases in a variety of New York State courts, as well as Federal Sector cases for the Administrative Law Judges of the Equal Employment Opportunity Commission New York Office.

Brenton performed extremely well in my class that first semester. His writing was clear and tight and he assimilated academic materials into practice very quickly. I awarded him an A- that semester because he was still working on his confidence as a mediator – but I knew he had tremendous potential. Based upon what I saw from him in the classroom, I asked him to participate in the Advanced Mediation Clinic and immediately put him in charge of one of our largest projects.

Brenton's fieldwork in the Advanced Clinic proved my hunch beyond even what I could have imagined. First, Brenton has developed into a truly excellent mediator. Mediation work requires extensive preparation, equanimity under pressure and excellent ethical judgment. Brenton's abilities developed to the point that I asked him to coach other students through these mediations in his second semester – without me. He single-handedly brought students through extremely complicated legal, emotional and ethical challenges in their cases.

But more than that: Brenton has gained a sterling national reputation as a leader in our field because of his teaching and training abilities. These past two semesters, Brenton single-handedly ran our United Nations training program, in which he not only developed ideas for content, but researched the material, led a team of student presenters, and delivered high-impact trainings for the New York diplomatic corps. When a criminal law colleague of mine asked for a student to lead a training for her clinic in negotiating plea deals, I called Brenton. She reported that he did a phenomenal job. I also asked Brenton to help me in developing a full mediation training for the Department of Education Office for Civil Rights – a program that received national acclaim from experienced civil rights attorneys and mediators. In every one of the above situations, the seasoned professionals in the room could not believe they were working with a student. Brenton teaches the same way he mediates or performs research – he makes it look effortless.

Finally, as you'll see if you meet Brenton, he is a warm, loyal colleague who supports his teammates in every activity—an important quality for a judicial clerk working in a small office. This academic year, in which we fully "re-entered" after COVID, was a difficult one for many students. As an Advanced Clinic student, Brenton made my incoming students' experience substantially better with his presence as a mentor. Everyone loves working with him. As a first generation graduate student, his abilities and presence inspire more people than he will ever know. If I could hire him myself, I would.

I sincerely hope that you will hire Brenton for a judicial clerkship in your chambers. If I can provide you any additional information to help in your decision, please feel free to contact me anytime on my cellphone at (646) 660-0627, or by email at abc26@columbia.edu.

Sincerely,
Alexandra B. Carter
Clinical Professor of Law
Columbia Law School

May 14, 2023

To Whom it May Concern:

Please accept this recommendation on behalf of Brenton Brown, an applicant for a federal judicial clerkship with your chambers. I am a fifth year associate in the litigation department of Patterson Belknap Webb & Tyler LLP. Prior to joining the firm, I spent two and a half years as a litigation associate at Debevoise & Plimpton LLP and one year as a judicial clerk for Chief Judge Margo K. Brodie, United States District Court Judge for the Eastern District of New York. I had the opportunity to work closely with Brenton during his eight-week summer internship with Judge Brodie's chambers and can attest to his distinctive blend of intellect, analytical rigor, and empathy.

During the course of his internship, Brenton consistently showed a commitment both to honing his own legal skills and to serving as a resource for his fellow student interns. Almost immediately, Brenton distinguished himself for his diligence and enthusiasm in tackling his various assignments. I had the pleasure of working with Brenton on several different cases, including in connection with a *pro se* habeas petition with a complicated factual and procedural history. Despite the challenging nature of the case, Brenton was able to effectively and efficiently synthesize the intricate factual and procedural history in drafting the background section of the memorandum and order. Brenton also quickly mastered the applicable legal framework through which to analyze the timeliness and sufficiency of a *pro se* plaintiff's claims for false arrest and malicious prosecution pursuant to 42 U.S.C. § 1983 and New York State law.

Even during the short while I had the pleasure of working with Brenton, he demonstrated the writing and analytical skills necessary to excel in the legal profession. He has the intelligence and work ethic to handle the rigors of a judicial clerkship and the judgment and decency to uphold the highest standards of the United States District Court. For all of these reasons, I strongly support Brenton's application.

Please let me know if you have any questions or if I can be of any further assistance.

Very truly yours,

Beth Shane
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Columbia Law School

June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Re: ***Recommendation for Brenton Browne***

Dear Judge Chutkan:

I write this letter in support of Brenton Browne's application to clerk in your chambers. Brenton was an outstanding student—the outstanding student—in my constitutional law course in the fall of 2020, earning an A+ grade and a "Best in Class" award. He is, moreover, the embodiment of the American dream. He will be an excellent law clerk.

Columbia permits professors to award exactly one A+ and exactly one "Best in Class" prize. It is common for me to award these distinctions to different students, as often the very top exam performance is not someone who especially distinguished themselves over the course of the semester. Brenton's 1L year was different. Brenton submitted the strongest (blind-graded) exam in the class. He also submitted the strongest of the (ungraded) midterm exams. These exams covered an exceptionally wide range of complex constitutional law topics, including immigration and citizenship, antidiscrimination law, substantive due process, presidential immunity, impeachment, gender and sexuality law, and many other legal issues. Brenton not only mastered the substantive material, but he proved himself a remarkably clear thinker and organized writer. This is a skill that is difficult to teach, but across two different exam settings, it is evident that—whether through extensive preparation or innate ability—Brenton displays a preternatural capacity to structure his legal analysis logically and with economy.

I decided to award Brenton the "Best in Class" prize in addition to the top exam grade because he was an unusually attentive, prepared, and curious student. He was, without fail, on top of the materials in the six times he was on call over the course of the semester. He was a frequent (but not too frequent) volunteer when he was not on call. He attended office hours regularly and showed a degree of engagement with the course themes and materials that makes me confident that he will quite enjoy being a lawyer.

The remarkable context for all of this well-deserved praise is that Brenton had an extremely difficult childhood. Brenton grew up in a home marred by terrifying levels of domestic violence and deep financial instability, eventually leading to multiple periods of homelessness. He moved constantly and regularly switched schools, until a foreclosure landed him, fortuitously, in a decent small-town Texas high school. It was there that he joined the debate team and found his voice, learning to formulate and hone arguments and for the first time developing the courage to assert himself publicly. Brenton eventually became the first person in his family to attend college. During college, at the University of North Texas, he worked hard while taking on two or three part-time jobs to put himself through school and send money home to his mother.

This is, to say the least, not the usual profile of the best student in a first-year constitutional law class at Columbia Law School. Not just that, but his classes that semester (including constitutional law) were mostly online due to the pandemic, which meant that Brenton did not have a chance to enjoy the organic opportunities to learn from professors and other students that many first-generation students rely on to bring them greater parity with the preparation their peers received earlier in life. Brenton has told me that, on the plane to New York before his first semester, he suffered from severe imposter syndrome and worried that he would not fit in—and he had better reason than most to fear that that was so. He not only "fit in" at Columbia but he thrived, not only performing well academically but immersing himself in numerous student organizations.

In person, Brenton is mature, self-possessed, earnest, and calming. He will thrive in a collaborative environment. As he enters the profession, he does so with an almost innate sensitivity to injustice in the world and the sense of self that only hardship can truly bring. I urge you to interview this remarkable student and person, so that you may see for yourself.

Thank you for your kind consideration. Please do not hesitate to contact me if I can further assist in your decision process.

Sincerely,

Jamal Greene
Dwight Professor of Law

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BRENTON BROWNE
Columbia Law School J.D. '2023
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CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is from my appellate advocacy seminar. We were asked to write respondents' brief for Supervalu, Inc., in the real Supreme Court case of *United States of America ex rel. Tracy Schutte & Michael Yarberry v. Supervalu, Inc., et al.* Supervalu was sued for allegedly violating the False Claims Act, 31 U.S.C. § 3729 *et seq.* Specifically, petitioners argued that Supervalu falsely reported the "usual and customary" prices of the pharmaceutical drugs it sold to customers. I argued that Supervalu could not have falsely reported the drug prices because there was no authoritative binding interpretation at the time Supervalu acted that explained what was a "usual and customary" price. I received high-level feedback and minor edits on word choice from my instructor. Some pages have been omitted to comply with page limits.

No. 21-1326

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
TRACY SCHUTTE & MICHAEL YARBERRY,
Petitioners,

v.

SUPERVALU, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

BRENTON BROWNE
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Counsel for Respondents

April 25, 2023

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly held that a defendant is not liable for penalty under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, when a defendant acts under a reasonable interpretation of an ambiguous regulation in the absence of a binding authoritative interpretation.

A claim under the FCA includes money spent to "advance a Government program or interest," and therefore, money spent on Medicaid and Medicare falls under this definition. 31 U.S.C. § 3729(b)(2)(A)(ii). Under Medicare and Medicaid, pharmacies who help administer the programs must report their U&C price to the government for reimbursement of the price paid by the general public for prescriptions. These reports must be accurate and truthful since the FCA imposes liability on anyone who "knowingly" submits a false claim. 31 U.S.C. § 3729(a)(1)(A). And the liability is not inconsequential. The FCA carries hefty penalties for false claims. In addition to treble damages, those found liable under the Act are required to pay a statutory penalty ranging from $5,000 to $10,000. 31 U.S.C. § 3729(a)(1)(G). The statute is also "remedial and exposes even unsuccessful false claims to liability." *United States v. New York Soc. for the Relief of the Ruptured & Crippled, Maintaining the Hosp. for Special Surgery*, No. 07 CIV. 292 PKC, 2014 WL 3905742, at *12 (S.D.N.Y. Aug. 7, 2014).

B. Factual and Procedural History

In the 1980s, in order to compete with competitors such as Walmart, and provide lower cost prescriptions to underinsured customers, Supervalu created a service policy that allowed its pharmacies to match prices of local competitors upon verification of the local competitor's lower price. Pet. App. 64a. Price matches were an exception to the ordinary retail price customers were charged. Indeed, price matches were not even considered unless requested by a customer. *Id.* Price matching constituted a small percentage (1.69%) of Supervalu's total drug sales and accounted for less than half (26.6%) of Supervalu's total cash sales during the relevant period. Pet. App. 65a. Price

matching never came close to comprising a majority of Supervalu's total drug sales or total cash sales. *Id.* Supervalu's advertisements never contained specific price terms for any specific drug. The ads explained that customers could receive information about the price-matching program from Supervalu employees. Pet. App. 64a.

During the relevant period, there was some uncertainty over the U&C price, but many entities defined U&C price to exclude price-matching. Pet. App. 8a. For example, the Academy of Managed Care Pharmacy defined U&C price as an "undiscounted price that individuals without drug coverage would pay at a retail pharmacy." Given the uncertainty surrounding the proper definition of U&C price and even affirmation that price-matching was not included in that definition, Supervalu reported the normal retail price as the U&C price instead of the customer requested price-matches. Pet. App. 77a.

There were three requirements of Supervalu's price-match policy: (1) customers had to initiate the price match, by, for example, explaining to a pharmacist that a competitor had a lower price and requesting a match; (2) the requested match price had to be from a local pharmacy within a certain distance from the Supervalu pharmacy; and (3) a Supervalu pharmacist had to verify the competitor's price. Pet. App. 7a. Price-match requests were never guaranteed and sometimes denied where a price could not be confirmed or the competitor was not selling the item that was the subject of the price-match.

Petitioners took issue with Supervalu's characterization of its U&C price and brought a *qui tam* suit against Supervalu in the United States

District Court for the Central District of Illinois for recovery of funds for the Government and affected States. Pet. App. 60a. Petitioners alleged that Supervalu submitted false or fraudulent claims to obtain federal funds to which it was not entitled in violation of the FCA, 31 U.S.C. § 3729 *et seq.*, and comparable false claims act and health care fraud statutes of the Plaintiff States.[1] *Id.*

The district court sided with petitioners with respect to the FCA's falsity prong and granted partial summary judgment. Pet. App. 62a. The falsity prong refers to the requirement that a false or misleading statement or representation be made in connection with a claim for payment or reimbursement from the government. The district court, relying on the Seventh Circuit's opinion in *Garbe*, held that price discounts can be considered the U&C price. *Id.* Specifically, the court stated that Supervalu's lower price discounts were offered to the general public and were widely and consistently available, and therefore, should have been reported as the U&C price. *Id.*

However, the district court further held that Supervalu did not have the requisite scienter under the FCA to be found liable. Pet. App. 2a. The court, relying on this Court's decision in *Safeco* that concerned the FCRA, held that Supervalu's application of "usual and customary price" was objectively reasonable at the time, regardless of whether it was right or wrong. Pet. App. 76a. The court found convincing that: (1) there were multiple district court decisions that endorsed similar interpretations; (2) there was no controlling authority at the time to negate Supervalu's interpretation; and (3) the *Garbe* court acknowledged that there was

[1] California and Illinois are the only Plaintiff States who remain in the suit.

widespread disagreement about the U&C meaning as evidenced by the grant of interlocutory appeal under 28 U.S.C. § 1292(b) to resolve the question. Pet. App. 78a. The court granted Supervalu's motion for summary judgment and dismissed the case, which petitioners appealed. *Id.*

The Seventh Circuit upheld the district court's ruling. Pet. App. 31a. The court explained that the reckless disregard standard "is the baseline scienter definition encompassed by the FCA's scienter requirement." Pet. App. 15a. The court then explained that the test for reckless disregard covered knowing violations as well, per *Safeco*. Pet. App. 20a. The court also held that *Safeco's* standard can only be applied where the legal obligations are unclear and no authoritative guidance warns otherwise. *Id.* The court rejected the argument that subjective intent matters to knowledge under *Safeco* and emphasized that a defendant cannot be held liable under the FCA if they adopted a reasonable interpretation of an uncertain legal obligation at the time of their conduct. Pet. App. 21a.

The court further held that the objective reasonableness of a defendant's interpretation of a statute or regulation is a question of law that depends on the source of the term and its definition. Pet. App. 23a. The court first looked to the definition of U&C price used in the regulations. *Id.* The court found the definition of "charges to the general public" to be susceptible to multiple reasonable interpretations. Pet. App. 24a. And the court concluded that Supervalu's understanding of its retail price as the price charged to the general public was "not inconsistent with the text of the U&C price definition." Pet. App. 25a.

Additionally, the court found that petitioners' overextended the court's holding in *Garbe*. Pet. App. 25a. The court explained that *Garbe* held that the U&C price included some discount program prices, but it did not hold that "this was the *only* reasonable interpretation of the term." *Id.* The court further stated that petitioners "had not shown that Supervalu's erroneous interpretation of the U&C price was unreasonable" when tethering the reasonableness inquiry to the text of the regulation, rather than any underlying policy. Pet. App. 26a.

Judge Hamilton disagreed with the majority's interpretation. Pet. App. 32a. He first considered the evidence presented by petitioners that Supervalu told the government for a long period of time that its "usual and customary" prices were much higher than the prices charged to most cash customers. Pet. App. 33a. Judge Hamilton noted that "a reasonable jury could easily find … [the] usual and customary prices were false under any reasonable interpretation of the term and that Supervalu knew that its claims were false." Pet. App. 35a. Judge Hamilton then explained that a reasonable jury could infer that Supervalu deliberately or "knowingly" defrauded the government based on its decades long practice of claiming higher reimbursements. Pet. App. 36a. Judge Hamilton also disagreed with the majority's reliance on *Safeco* to understand the meaning of "reckless disregard." Pet. App. 49a.

SUMMARY OF ARGUMENT

The FCA does not consider the subjective beliefs of a defendant in assessing liability for violating the Act when a defendant relied on a reasonable

interpretation of the law. There are several reasons for this conclusion.

First, the text of the statute does not support imposing a subjective scienter standard. The FCA uses common law terms in defining "knowing" and "knowingly" –the scienter standards for assessing liability. 31 U.S.C. §3729(b)(1). The most capacious of these common law terms is "reckless disregard." *United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013). "Reckless disregard" or "reckless" was the same common law term encompassed by "willfulness" that the Court in *Safeco* evaluated when considering the scienter standard for the FCRA. *Safeco*, 551 U.S. at 57–58. This Court concluded in *Safeco* that a "willful" violation of the FCRA could not occur where a defendant relied on an objectively reasonable interpretation of an unclear statute or regulation. *Id.* at 69. Similarly, a "knowing" violation of the FCA cannot occur where a defendant relies on an objectively reasonable interpretation of an unclear law. There is no reason to treat the same common law terms from *Safeco* differently in this case.

This Court in *Safeco* explained that "reckless disregard" was the scienter floor for liability in the FCRA context, and that the test used to measure whether one acted in reckless disregard should be an objective one. *Id.* The Court also stated that the test for "reckless disregard" was equally applicable to "knowing" violations even though both terms were distinct. *Id.* at 59–60. Similarly, the scienter floor for "knowing" violations in the FCA context is reckless disregard and the test to impose liability should be an objective one. The proper inquiry into determining liability is deciding whether a defendant's interpretation of an unclear legal obligation was

reasonable. The subjective thoughts or beliefs of the defendant should not factor into the liability determination.

In *Safeco*, this Court looked to the Restatement (Second) of Torts § 500 for guidance in defining "recklessness" in the common law. *Safeco*, 551 U.S. at 68–69. The Court identified a high bar for finding liability under the FCRA and held that a company subject to the FCRA does act in reckless disregard unless its interpretation was unreasonable and there was a high risk that the company was violating the law. Similarly, importing this common law meaning to the FCA means a defendant cannot be held liable unless its interpretation of an unclear statute or regulation was objectively unreasonable.

Petitioners' subjective scienter theory has been rejected by every court that has addressed what is the proper scienter standard for the FCA. *See, e.g.*, *Olhausen v. Arriva Medical,* LLC, No. 21-10366, 2022 WL 1203023, at *2 (11th Cir. Apr. 22, 2022) (concluding that the requisite scienter for an FCA claim was lacking under an objective standard of reasonableness). Petitioners' argument is premised on a misunderstanding of what it means to actually *know* something. When a statute or regulation is unclear and susceptible to multiple interpretations—as is the case here—there can be no "actual knowledge" of the falsity of an interpretation. There can only be "actual knowledge" of falsity when there is a clear definitive interpretation that is binding on a defendant, but the defendant chooses to ignore the correct interpretation. *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287–288 (D.C. Cir. 2015).

Second, petitioners argue that Supervalu made its

interpretation of U&C post hoc or asynchronous with its action. However, contemporaneity is not the proper focus of the FCA scienter inquiry. The proper and only focus of the scienter inquiry is whether Supervalu's interpretation was reasonable. Scrutinizing the timing of the interpretation presumes there was a binding authoritative interpretation Supervalu chose to ignore, and it presumes that Supervalu knew that its interpretation was false. Both presumptions are misplaced when a defendant like Supervalu is incapable of knowing the unknowable. Prior to *Garbe,* there was no interpretation that would have put Supervalu on notice of the proper definition of U&C.

In *Safeco*, this Court explained what should be considered binding authoritative guidance—courts of appeals decisions or binding guidance from a relevant regulatory agency. *Safeco*, 551 U.S. at 70 & n.20. Neither existed prior to *Garbe* to warn Supervalu that its interpretation was incorrect. Petitioners suggest that other sources should have warned Supervalu away from its interpretation, but these sources are non-binding. CMS would have had to go through the process of notice-and-comment rulemaking or formal administrative adjudication for its decision or guidance on U&C to be considered binding authoritative guidance. None of this took place, and therefore, Supervalu had to interpret the unclear regulation.

Lastly, an objective reasonableness standard will correctly sort out those who should be liable under the FCA from those who should not be. The objective scienter inquiry that focuses on the reasonableness of an interpretation considers the information that exists at the time a defendant commits an action. When a defendant ignores authoritative binding guidance that

exists at the time of their action, the defendant will be held liable. On the other hand, a defendant who does not have the benefit of authoritative binding guidance should not be held liable. An objective standard better distinguishes culpable from non-culpable conduct and avoids due process concerns stemming from a lack of fair notice about the substance of an unclear statute or regulation.

ARGUMENT

I. The FCA Does Not Impose Punitive Liability on a Claimant for Reasonably Interpreting an Unclear Regulation.

Petitioners mistakenly argue that the FCA has a subjective scienter standard that considers a defendant's state of mind in deciding to impose liability. Br. 4. But subjective intent does not matter when actual knowledge cannot be shown due to a defendant's reliance on a reasonable interpretation of a regulatory term. *Purcell*, 807 F.3d at 290. The FCA's text accords with this understanding.

A. The Text of the FCA Supports an Objective Standard.

1. The FCA defines "knowing" and "knowingly" to encompass three common law standards—actual knowledge, deliberate indifference, and reckless disregard." 31 U.S.C. §3729(b)(1)(A)(i)-(iii). Nowhere in the statute is there any indication that Congress intended for specific definitions outside of the common law to control. *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 (2016). Indeed, "if a word is obviously transplanted from another legal source, whether the common law or legislation, it brings the old soil with it." *Some*

Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947). In *Safeco*, the Court addressed the scienter standard for willfulness as used in the FCRA. *Safeco*, 551 U.S. at 52. Specifically, the Court had to determine what was required to show that a business "willfully" failed to comply with the requirements of the FCRA, and whether a violation committed in reckless disregard fell under that definition. *Id.* Ultimately, the Court concluded that "willful" covered not only "knowing" violations, but also violations committed in reckless disregard. *Id.* at 71.

Although the Court made clear to state that "knowingly" and "reckless disregard" are distinct terms, it further held that the objective scienter standard used for the FCRA precluded liability under either term. *Safeco*, 551 U.S. at 59–61. The Court explained that "reckless disregard" was the scienter floor for establishing willful violations, but the test used for reckless disregard was equally applicable for establishing "knowing" violations. *Id.* Petitioners and the dissent argue that the reach of *Safeco* extends only to the scienter standard of "reckless disregard." However, this position conflicts with this Court's holding in *Safeco*. In *Safeco*, the Court explained that to be entitled to statutory and punitive damages under the FCRA, a violation must be "willful." *Id.* at 53. A violation of the FCRA is "willful" only if the person or entity *knows* that its conduct violates the statute or recklessly disregards its requirements. *Id.* at 57. The Court applied general understandings of recklessness for "civil liability" and held that Safeco had not acted recklessly or knowingly because its conduct was "not objectively unreasonable" and no "authoritative guidance" warned it away from taking the action. *Id.* at 69–70.

In *Safeco*, this Court further stated that where there is room for more than one reasonable interpretation of a statute or regulation, "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a *knowing* ***or*** *reckless* violator." *Safeco*, 551 U.S. at 70 n.20. *Safeco* held that the appropriate inquiry is whether a defendant's understanding of a rule or regulation was objectively reasonable. *Id.* at 69. Here, there is no evidence that Supervalu either knowingly or in reckless disregard committed violations of the FCA, as no binding authoritative guidance existed at the time that Supervalu interpreted the meaning of U&C.

2. Petitioners rely heavily on the Restatement (Second) of Torts § 526, as well as centuries-old cases to support their view that the FCA has a subjective scienter component. Br. 24–26. This is wrong. In *Safeco*, this Court emphasized that recklessness, by definition, must be measured from an objective standpoint of reasonableness. *Id.* at 49. The Restatement provision petitioners would like the Court to apply is different from the Restatement provision used by this Court in *Safeco*. In *Safeco*, the Court looked to § 500 in the Restatement (Second) of Torts for guidance in defining "recklessness" in the common law. *Safeco*, 551 U.S. at 68–69. Petitioners take issue with the Court looking to § 500 and using the standard of "reckless disregard" as it was used in a physical safety context. Br. 15. However, the specific context in which a common law term is defined does not matter. A common law definition is transferable from statute to statute and should be given its common law meaning, except where that meaning does not fit. *United States v. Castleman*, 572 U.S. 157, 163 (2014) (internal quotations omitted).

The Court in *Safeco* identified a high bar for finding liability under the FCRA and held that a company subject to the FCRA does not act in reckless disregard unless "[its] action is not only a violation under a reasonable reading of the statute's terms, but shows that [it] ran risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69. The Court ultimately held that Safeco's reading, while erroneous, had foundation in the statutory text and was not unreasonable. *Id.*

Petitioners state that reliance on § 500 was "cherry picking" by the Seventh Circuit. Br. 44. However, the Seventh Circuit was merely using the same logic this Court used in *Safeco*. And it is petitioners who are doing the cherry-picking. Petitioners cite to *Safeco* in stating that "recklessness is not self-defining." Br. 41. *Safeco* did say that "recklessness is not self-defining," but it also said "the common law has generally understood [recklessness] in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Safeco*, 551 U.S. at 68 (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

3. Subjective scienter is not the appropriate measure for deciding this case. The requirements of petitioners' subjective scienter standard do not map onto the logic of the FCA. The FCA is concerned with imposing liability where there is clear indication that a defendant knew the interpretation of a law was incorrect. Hence the use of the words "actual," "deliberate," and "disregard" used in the provisions. 31 U.S.C. §3729(b)(1)(A)(i)-(iii). Concluding that the common-law definition of recklessness governs the FCA cause of action for fraud is not coming up with a

"one-size-fits-all" meaning (Br. 41.), instead, it honors the meaning of common law. A common law definition means that a word should have its common meaning. *Field v. Mans*, 516 U.S. 59, 69 (1995) ("It is ... well established that [w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotations omitted).

Petitioners suggest that the FCA's abrogation of common law fraud in some respects—doing away with common-law elements of reliance and damages and relaxing the intent requirement—is antithetical to the view that the well settled meaning of common-law terms was meant to be incorporated in the statute. Br. 23. That is incorrect. This Court has stated that Congress "presumably knows and adopts the cluster of ideas that were attached to *each borrowed word* in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Beck v. Prupis*, 529 U.S. 494, 500–501 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952). In other words, Congress knows how to abrogate some aspects of the common law while retaining other aspects. Congress's incorporation of common law terms into the FCA without further definition suggests Congress wanted courts to apply ordinary common law definitions. And Congress's explicit abrogation of the common law in some respects demonstrates that it was perfectly capable of being explicit of its intent to include non-common law definitions for common-law terms.

Petitioners' argument that the FCA and FCRA are two fundamentally different statutes with different

scienter standards also misses the mark. Br. 42. First, while there may be differences between the two statutes, these differences do not change the meaning of common law terms, absent other indication. *Safeco*, 551 U.S. at 58. Knowing and reckless are included in both statutes, and the common law definitions of those terms are the appropriate sources for defining them. Additionally, the Court in *Safeco* explained that the scienter floor for establishing willful violations under the FCRA was reckless disregard. *Safeco*, 551 U.S. at 59–61. Similarly, reckless disregard is also the scienter floor for establishing scienter under the FCA. 31 U.S.C. § 3729(b)(1)(A)(iii). The same scienter floor for establishing violations under both statutes supports application of the *Safeco* standard to the FCA.

B. Safeco Makes Clear That a Claimant Who Relies on a Reasonable Interpretation of an Unclear Regulation Cannot be Found Liable Under the FCA.

1. Petitioners stand alone in their understanding of the FCA. Courts around the country have overwhelmingly adopted Supervalu's view. In the years following *Safeco*, several courts of appeals have considered whether the Court's ruling applies to the FCA. Every single circuit that has considered the scienter standard has concluded that a defendant's subjective belief is irrelevant when a regulation is susceptible to multiple reasonable interpretations. *See, e.g.*, *Olhausen*, 2022 WL 1203023, at *2 (11th Cir. Apr. 22, 2022) (concluding that the requisite scienter for an FCA claim was lacking under an objective standard of reasonableness); United *States ex rel. Donegan v. Anesthesia Associates of Kansas City, PC*, 833 F.3d 874, 880 (8th Cir. 2016) (finding Medicare

provider's interpretation of an ambiguous term objectively reasonable to negate a claim for fraud under the FCA); *Purcell*, 897 F.3d at 290 (explaining that the FCA's knowledge element is examined under an objective standard of reasonableness); *United States ex rel. Streck v. Allergan Inc.*, 746 F. App'x 101, 106 (3d Cir. 2018) ("the FCA does not reach an innocent, good faith mistake about the meaning of an applicable rule or regulation. Nor does it reach those claims made based on reasonable but erroneous interpretations of a defendant's legal obligations.").

The *Safeco* objective reasonableness standard precludes liability as a matter of law. *Safeco* explained that when willfulness is a condition of civil liability, it generally covers knowing *and* reckless violations of a standard. *Safeco*, 551 U.S. at 57; *see also McLauglin v. Richland Shoe Co.*, 486 U.S. 128, 132–133 (1988). The same use of knowing and reckless are found in the FCA's scienter provision. And "willful," "wanton," and "reckless" "have been treated as the same thing or at least coming out at the same legal exit." *Id.*

2. *Safeco* remains good law. Petitioners rely heavily on this Court's opinion in *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93 (2016), to argue that *Safeco*'s holding does not apply to the FCA's cause of action for fraud. Br. 41. But this argument is premised on a misunderstanding of what this Court held in *Halo* and the holding's limitations. Petitioners argue that *Safeco* was cabined by the Court in *Halo* based on the Court's reasoning that "bad-faith infringement is an independent basis for enhancing patent damages." *Id.* at 47. Petitioners state that, like *Halo*, "history and precedent hold that a defendant's subjective lack of belief in the truth of his statement is sufficient to support an action for fraud." *Id.* at 48. Beyond

petitioners' failure to cogently link "history and precedent" to their position and the text of the statute, petitioners' argument does not show that *Safeco* in any way has been undermined.

In *Halo*, this Court considered the proper standard for enhancing patent damages under § 284 of the Patent Act. H*alo*, 579 U.S. at 97. The Court did hold that subjective willfulness was the proper standard for finding liability. *Id.* at 105. However, the standard the Court was considering was judicially developed and Congress did not specify a scienter standard in the patent statute for enhancing damages. *Id.* at 104–105. Thus, the patent context is entirely different from the FCA or FCRA, where Congress was explicit about the proper scienter inquiry. *Halo* is, quite frankly, irrelevant. *Safeco* remains good law and is a seminal case in instructing the Court on the proper scienter standard of the FCA.

C. There Can Be No Finding of Actual Knowledge When There is Nothing to Be Actually Known or Deliberately Ignored.

1. Supervalu could not have acted knowingly without an honest belief in the truth of its interpretation when there was no authoritative source on how to interpret the meaning of "usual and customary." Supervalu could not have knowingly violated the law when there was more than one reasonable interpretation of the law. Supervalu did not have actual knowledge that it was making a false claim because it did not believe the claim was false. No matter how petitioners try to frame the issue, the problem with their argument resurfaces again and again. A defendant cannot violate the FCA's scienter

component when it relies on a reasonable interpretation of a law and there is no binding authoritative source on interpreting the law. That is exactly what this Court explained in *Safeco*.

Petitioners contend that half-truths can be actionable conduct. Br. 24 n.7. However, petitioners' position ignores the objective standard of reasonableness used in the FCA. A reasonable interpretation of an ambiguous statute cannot be considered a half-truth. Genuine ambiguity means there is no truth – only degrees of reasonableness. The FCA has a "rigorous" knowledge or scienter standard that does not impose liability for reasonable but erroneous interpretations of legal questions. *Escobar*, 136 S. Ct. 1989, 2002 (2016). Reasonable does not mean that the interpretation ultimately agreed upon had to be the best one, the second best one, or even a good one. *Oasis International Waters, Inc. v. United States*, 134 Fed. Cl. 405, 456 (2016). Reasonable means that the interpretation was possible under the circumstances and had a foundation "in the less-than-pellucid statutory text," Pet. App. 26a, and that the interpretation was not so objectively out of bounds with the text or common sense that it cannot stand. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 332 (2007) (Scalia, J., concurring).

2. The district court found that the relevant legal standards were ambiguous prior to *Garbe*. Pet. App. 85a. Prior to *Garbe* and during the relevant period, there was no court decision or any sort of guidance to direct Supervalu to take a specific course. Pet. App. 31a. Instead, Supervalu had to evaluate the provisions and come up with its own conclusion. Simply because petitioners disagree with that conclusion does not mean Supervalu should be subject to liability. Petitioners essentially argue the

incredible position that any doubt of belief in a claim's truth means a fraud was committed. Br. 29. Petitioners, relying on § 526(b) of the Restatement (Second) of Torts, state that "a defendant who has doubts about whether a statement is true but asserts it anyway is liable for fraud if the statement is false." *Id.* Under petitioners' view, liability would be boundless. A claim could only be made when there is a hundred percent belief in its truth. This surely cannot be the goal of the FCA. Petitioners' argument misunderstands that the focus of the FCA's objective scienter standard is not on truth or falsity, but on reasonableness. Therefore, in the absence of binding authoritative guidance, it does not matter that an interpretation turns out to be false. If the interpretation was reasonable at the time that it was made, liability should not attach.

Safeco concerned situations where "falsity turn[ed] on a disputed interpretive question" that was unresolved due to a lack of authoritative guidance. *Purcell*, 807 F.3d at 288. *Safeco* demonstrates that a party can make an educated guess about what the law entails, but the law does not "exist[] in fact or reality" without any authoritative guidance resolving a disputed question. *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S.Ct. 768, 776 (2020). Educated inferences or guesses about a legal interpretation are different from having actual knowledge or being deliberately ignorant of a legal requirement. Indeed, "willful conduct cannot make definite that which is undefined." *Screws v. United States*, 325 U.S. 91, 105 (1945). Even if Supervalu knew that its interpretation was likely to be wrong once binding authoritative guidance resolved the uncertainty, this simply does not matter. All that matters is that Supervalu made a reasonable interpretation before such guidance

existed.

Petitioners state that there was some evidence of malfeasance on Supervalu's part, and that the interpretation of the regulation was likely made post-hoc. Br. 16, 19. This argument ignores that Supervalu's position on the regulation was quite common and was compatible with the regulatory text. Pet. App. 25a. Several parties before Supervalu interpreted the U&C price in the same manner as Supervalu. *See Forth*, 2018 WL 1235015 at *5. Petitioners also state that Supervalu' executives had some concerns about the "integrity" of the price-matching scheme. *Id.* at 23. Again, this is irrelevant. Even if Supervalu had some concerns about its interpretation of the U&C price reporting requirement, those concerns do not matter because there was no binding authoritative guidance directing Supervalu on the correct interpretation.

Applicant Details

First Name	**Amanda**
Last Name	**Cabal**
Citizenship Status	**U. S. Citizen**
Email Address	**apc2167@columbia.edu**
Address	**Address** **Street** **167 Waverly Avenue #7** **City** **Brooklyn** **State/Territory** **New York** **Zip** **11205** **Country** **United States**
Contact Phone Number	**3155157018**

Applicant Education

BA/BS From	**University of Rochester**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Human Rights Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience **Appellate**

Recommenders

Hoag-Fordjour, Alexis
alexis.hoag@brooklaw.edu
2036454918
Sturm, Susan
ssturm@law.columbia.edu
212-854-0062
Genty, Philip
pgenty@law.columbia.edu
212-854-3250

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Amanda Cabal
167 Waverly Avenue, #7
Brooklyn, NY 11205
(315) 515-7018 • apc2167@columbia.edu

June 11, 2023

The Honorable Tanya S. Chutkan
United States District Court
District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am a Staff Attorney at the Second Circuit Court of Appeals and a 2022 graduate of Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2024 or any year thereafter. As I am pursuing a public interest law career, I find the prospect of clerking in your chambers particularly appealing.

I ultimately hope to build a legal career representing currently and formerly incarcerated individuals, and I am seeking a clerkship at the district level to gain exposure to courtroom proceedings and the realities of litigation. I greatly admire your extensive experience litigating both criminal and civil matters, and I believe that clerking in your chambers would enable me to learn how to advocate effectively in both contexts.

In my current role at the Second Circuit, I provide legal advice and recommended dispositions to the judges of the Court. I manage a full caseload of pro se appeals, producing clear and concise bench memoranda on a wide array of issues in a timely fashion. This work has prepared me well for a clerkship and I am confident that with my writing and research skills, in addition to my dedication to public service, I would contribute meaningfully to your chambers.

Enclosed please find a transcript, resume, and writing sample. Also enclosed are letters of recommendation from Professors Philip M. Genty (212 854-3250, pgenty@law.columbia.edu), Susan P. Sturm (212 854-0062, ssturm@law.columbia.edu), and Alexis J. Hoag-Fordjour (203 645-4918, alexis.hoag@brooklaw.edu) all of whom have supervised my work both in and outside of the classroom.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Amanda Cabal
Amanda Cabal

Amanda Cabal

apc2167@columbia.edu • (315) 515-7018 • www.linkedin.com/in/amanda-cabal

Education

Columbia Law School New York, NY
J.D., May 2022
Honors: Harlan Fiske Stone Scholar (for academic achievement)
Lowenstein Fellow (awarded to a CLS graduate who shows exceptional dedication and potential for contribution to public interest law)

Activities: A Jailhouse Lawyer's Manual, Executive Articles Editor
Human Rights Law Review, Staff Editor
Prison Healthcare Initiative, President

University of Rochester Rochester, NY
B.A., *cum laude*, May 2018
Majors: International Relations and History
Take 5 Scholar: (fellowship to study *The Evolution of Modern Poetry*)
Study Abroad: Freiburg, Germany, Fall 2016

Experience

U.S. Court of Appeals for the Second Circuit New York, NY
Staff Attorney August 2022 – Present
Prepare bench memoranda and orders providing legal analysis and recommended dispositions, in both counseled and *pro se* cases, for the judges of the Second Circuit. Subject matter includes: civil rights, criminal law and procedure, constitutional law, *habeas corpus*, securities, appellate jurisdiction, and civil procedure.

Criminal Defense Clinic New York, NY
Student Attorney Spring 2022
Represented individuals facing misdemeanor charges in New York City courts from arraignment through the final disposition. Developed litigation strategies, appeared in court, and provided a holistic defense to clients, including counseling on collateral consequences.

Squire Patton Boggs Public Service Initiative New York, NY
Legal Extern Fall 2021
Assisted indigent clients challenging death sentences and seeking *habeas* relief focusing on constitutional rights.

The Legal Aid Society – Prisoner's Rights Project New York, NY
Legal Intern Summer 2021
Supported attorneys pursuing class actions related to issues of solitary confinement, heat distress, and inadequate mental health treatment on behalf of people in NYC jails. Conducted research and wrote memos on access to personnel records and discrimination under the ADA for potential litigation in both state and federal court.

Paralegal Pathways Initiative New York, NY
Fellowships Coordinator, Summer Research Assistant 2020-2022
Led team of law students working on project for justice-impacted people in New York seeking employment in the legal field. Partnered with legal organizations to create fellowship positions, oversaw placements, and identified funding sources.

Phillips Black New York, NY

Legal Extern 2020-2021
Drafted language for a capital § 2254 *habeas corpus* brief. Focused on removing procedural bars and obtaining relief under *Atkins* in state and federal post-conviction proceedings.

Prisoner's Legal Services of New York Ithaca, NY
Legal Intern Summer 2020
Researched and wrote memoranda on a solitary confinement, excessive use of force, and access to mental health treatment. Reviewed disciplinary hearings, wrote advocacy letters, and drafted administrative appeals.

Columbia
Law School

Registration Services

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registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Amanda P Cabal

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L9244-1	Criminal Defense Clinic	Baylor, Amber; Low, Brent	3.0	A-
L9244-2	Criminal Defense Clinic - Project Work	Baylor, Amber; Low, Brent	4.0	A-
L6473-1	Labor Law	Andrias, Kate	4.0	B+
L9160-1	S Paralegal Pathways Initiative Leadership Seminar	Genty, Philip M.; Strauss, Ilene	2.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6791-1	Ex. Constitutional Rights in Life and Death Penalty Cases	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	A-
L6791-2	Ex. Constitutional Rights in Life and Death Penalty Cases - Fieldwork	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	CR
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
L6359-1	Professional Responsibility in Criminal Law	Cross-Goldenberg, Peggy	3.0	B
L9160-1	S Paralegal Pathways Initiative Leadership Seminar	Genty, Philip M.	2.0	CR
L8293-1	S. Access to Justice: Current Issues and Challenges [Minor Writing Credit - Earned]	Richter, Rosalyn Heather; Sells, Marcia	2.0	A-
L9563-1	S. Mental Health Law	Levy, Robert	2.0	B+

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Simonson, Jocelyn	3.0	A
L6655-1	Human Rights Law Review		0.0	CR
L6169-2	Legislation and Regulation	Johnson, Olatunde C.A.	4.0	B+
L8520-1	P. Capital Post Conviction Defense Practicum	Hoag, Alexis	2.0	A-
L8520-2	P. Capital Post Conviction Defense Practicum: Experiential Lab	Hoag, Alexis	2.0	CR
L8517-1	Workshop on Facilitating Meaningful Reentry	Genty, Philip M.	2.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8419-1	Abolition: A Social Justice Practicum	Harcourt, Bernard E.; Hoag, Alexis	2.0	A
L8419-2	Abolition: A Social Justice Practicum: Experiential Lab	Harcourt, Bernard E.; Hoag, Alexis	1.0	A-
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L6474-1	Law of the Political Process	Briffault, Richard	3.0	B+
L6675-1	Major Writing Credit	Genty, Philip M.	0.0	CR
L6695-1	Supervised JD Experiential Study	Genty, Philip M.	1.0	CR
L6683-1	Supervised Research Paper	Genty, Philip M.	1.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Barenberg, Mark	4.0	CR
L6108-4	Criminal Law	Harcourt, Bernard E.	3.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6177-1	Law and Contemporary Society	Moglen, Eben	3.0	CR
L6121-25	Legal Practice Workshop II	Polisi, Caroline Johnston	1.0	CR
L6118-2	Torts	Zipursky, Benjamin	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-1	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	B+
L6105-3	Contracts	Jennejohn, Matthew C.	4.0	B
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-25	Legal Practice Workshop I	Izumo, Alice; Polisi, Caroline Johnston	2.0	P
L6116-1	Property	Glass, Maeve	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 86.0

Total Earned JD Program Points: 86.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	Harlan Fiske Stone	3L
2020-21	Harlan Fiske Stone	2L
2019-20	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	20.0

June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

Amanda Cabal, a member of Columbia Law's class of 2022, asked me to write this letter of recommendation in support of her application for a judicial clerkship. I happily accepted. Amanda is currently a staff attorney for the U.S. Court of Appeals for the Second Circuit. While at Columbia, I served as her instructor for two courses and witnessed her commitment to public service and her unflappable work ethic. These skills, combined with her nuanced understanding of the law, would make Amanda an excellent law clerk. I strongly recommend that you invite her to join you in chambers. In my fifteen years of supervising and educating young lawyers and law students, Amanda is one of the most diligent, thoughtful, and hard-working students I have encountered. As a former law clerk and former assistant federal defender, I am confident that Amanda would be able to successfully perform the duties of a clerk.

I first met Amanda in the fall of 2020 when she enrolled in my course, *Abolition: A Social Justice Practicum*. I had the pleasure of working with Amanda for a second semester when she joined my class, *Capital Post-Conviction Defense Practicum* in the spring of 2021. Both classes combined in-class instruction with outward facing fieldwork on behalf of incarcerated clients and on social justice campaigns. Amanda's contributions during seminar and to the fieldwork revealed were exemplary. Amanda chose to devote both semesters to working on behalf of a death sentenced individual in Mississippi pursuing federal habeas corpus relief. Her areas of focus were navigating the petitioner's potential *Brady v. Maryland* claim and helping to show that the petitioner fit the diagnostic criteria for intellectual disability under *Atkins v. Virginia*. The assignments required Amanda to digest a complicated post-conviction record, understand the relevant legal standards, and navigate procedural default. Amanda's contributions to the client's case were impressive. Her eagerness to tackle difficult research areas and her ability to incorporate feedback made her a valued member of the advocacy team.

In class, Amanda regularly provided welcome insights into the social, political, and historical forces that shape the criminal legal system in this country. A native of upstate New York, Amanda had a deep understanding of the centrality of the carceral system in rural communities to provide jobs, private contracts, and sustain the local economy. Her perspective helped her classmates understand that to move toward carceral abolition, states must provide jobs and resources to rural communities that otherwise rely on prisons for economic survival. On other topics, Amanda was unafraid to share her analysis of difficult legal concepts and to explore related policy considerations.

Amanda's commitment to public service extended outside the classroom to various social justice initiatives in the local community. As president of the Prison Healthcare Initiative, Amanda helped lead law student efforts to assist incarcerated people curtail the spread of coronavirus. Amanda also served as a leader in Columbia's Paralegal Pathways Project, which helps formerly incarcerated people train for and land paralegal jobs in local legal organizations. In addition to training incarcerated people on best legal research practices, Amanda recruited local organizations to partner with the Project and helped to destigmatize incarceration in the workplace.

Equally as important, Amanda is funny, engaging, and curious. Outside of class, Amanda and I often spoke about her experiences in law school, her intentions after graduation, and the difficulty she experienced creating robust public service opportunities for herself and her classmates in a corporate-dominated learning environment. We spoke candidly about the unique pressures and demands of advocating for people from under-resourced communities. Amanda approached these discussions with experience, thoughtfulness, and care. I have enjoyed remaining in contact with Amanda since she graduated, and I left Columbia to join the faculty at Brooklyn Law. As a staff attorney for the U.S. Court of Appeals for the Second Circuit, Amanda has further honed her research and writing skills in a variety of contexts, which will be an invaluable asset to your chambers,

Amanda Cabal is exactly the kind of student who would bring the full richness of her perspective and experiences to the table. She has a sharp legal mind and a kind heart; she would make a fantastic law clerk. I give her my strongest recommendation. Please contact me, alexis.hoag@brooklaw.edu or (203) 645-4918, should you have any questions or need additional information.

Warm regards,

Alexis Hoag-Fordjour

June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am writing to recommend Amanda Cabal for position as your law clerk. I worked closely with Amanda during her second and third year at Columbia Law School through her role in the Paralegal Pathways Project (PPI) and the Jailhouse Lawyers Manual. As the Principal Investigator on grants relating to the fellowship, recruitment, and sustainability of PPI and a faculty supervisor for the Jailhouse Lawyers Manual, I had the opportunity to experience firsthand Amanda's extraordinary day-to-day work. Her commitment, effectiveness, insight, wisdom, analytical rigor, and follow through were exemplary. She was a consistent, grounding, and powerful presence in the work, combining comprehensive research, excellent writing, and commitment to building the leadership of people directly affected by mass incarceration. Her daily actions spoke volumes about the centrality of justice to Amanda's sense of self, her professional identity, and her daily practice. She used her time in law school to build her capacity as a legal advocate and a change agent equipped to collaborate with and advocate for system-impacted individuals and communities. She has carefully crafted a professional trajectory that will continue to position her to be an effective lawyer, leader, and collaborator. She is an outstanding and exemplary candidate for a clerkship. I recommend her with great enthusiasm and without reservation.

Amanda served as PPI's Fellowship Coordinator and Summer Research Assistant during her second summer, creating an innovative and lasting collaboration between PPI and the Jailhouse Lawyers' Manual. Her thorough and beautifully presented research on barriers to employment stemming from incarceration became a pillar of PPI's successful application for the Clifford Chance Racial Justice Award, and then a part of PPI's curriculum. Without fanfare or self-promotion, Amanda just consistently did the work that needed to be done, often going way beyond the call of duty to help create a truly path-breaking collaboration among law students and people directly affected by incarceration. Her work modeled the value of incorporating directly affected individuals into advocacy, research, and policy making, and also supported those individuals to increase their success and thrive in these roles. This focus is both innovative and necessary to advance transformative change in the criminal legal system.

Amanda also demonstrated strong leadership abilities as Fellowship Coordinator for PPI. She enlisted a group of students in developing the fellowship component of PPI, participated in fund-raising, built collective interest in supporting the work going forward, and laid the foundation for strong leadership to emerge so that the work would be sustained going forward. Her commitment to public interest is unwavering and profound, leading to her receipt of the Lowenstein Fellowship, a highly competitive award for students pursuing public interest. As I said in my recommendation, "Amanda is the real deal. I cannot imagine a more deserving recipient of the Enhanced LRAP scholarship."

Amanda's position as the Staff Attorney for the U.S. Court of Appeals of the Second Circuit has further strengthened her already outstanding research and writing skills and crystallized her interest in clerking. That position has drawn on her analytical and communication skills, affording her the experience of writing bench memoranda and orders, providing legal analysis and proposed dispositions in both counseled and pro se cases, most often reviewing pro se filings. I have been impressed with the insightfulness, care, and balance apparent in her reflections about her experience in the prisoner's rights and criminal appeals space.

Amanda is an unusually committed, thoughtful, and responsible lawyer, one of the most effective I have worked with at Columbia Law School. She also has a dry and wonderful sense of humor, and a calm presence that makes her a joy to work with. I have no doubt that Amanda will be an outstanding law clerk, and give her my unqualified recommendation. Please feel free to follow up if I can provide any additional information.

Sincerely,

Susan Sturm

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

Philip M. Genty
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor
in Professional Responsibility

435 West 116th Street
New York, NY 10027
T 212 854 3250 F 212 854 3554
pgenty@law.columbia.edu

May 2023

Re: Amanda Cabal

Dear Judge:

I am writing to recommend Amanda Cabal, a 2022 graduate, for a judicial clerkship. Based on my work with Ms. Cabal throughout her time at Columbia, I do so with enthusiasm.

I first worked with Ms. Cabal in my Fall 2019 Civil Procedure course. She was fully engaged and well-prepared throughout the semester. One class, in particular, stands out in my memory. I had "cold-called" her on *Singletary v. Pennsylvania Department of Corrections*[1], a case involving the application of Federal Rule of Civil Procedure 15(c)(1)(C). Ms. Cabal recounted the sad facts of the case – the prison suicide of the plaintiff's son, and the court's conclusion that she was not permitted to amend her complaint to add as a defendant the member of the prison's psychological services staff who had been working with her son before he took his life. Ms. Cabal, in analyzing the court's reasoning, drew on her background as someone who had grown up in a part of New York State with a concentration of prisons. She knew many people who were employed by these facilities, and she was therefore able to reflect on the perspectives of both the plaintiff and the correctional employee the plaintiff was seeking to hold responsible for the suicide. Ms. Cabal's analysis was sensitive and nuanced, and it brought both the tragedy and the complexity of the case to life for her fellow students. For me, this was one of the highlights of the semester.

Because of my strongly positive impressions of Ms. Cabal, I was thrilled when she chose to become involved, in her second year, with a prison reentry project I oversee with two of my faculty colleagues. The project, the Paralegal Pathways Initiative (PPI), has created a paralegal course targeted at formerly incarcerated individuals with prior experience as "jailhouse lawyers." This project has focused on the recognition that during their incarceration, many women and men have been leaders within prison communities and have taken prominent roles in programs on parenting, education, and business skills. A challenge for these individuals after release is to have their assets recognized and to be able to utilize these to achieve success. We see PPI as one way to address this.

[1] 266 F.3d 186 (3d Cir. 2001)

In the Fall 2020 semester, Ms. Cabal and the other students were registered with me for Supervised Experiential Study, which involved periodic (Zoom) meetings to discuss the students' work on various components of the project. From the beginning of the semester, Ms. Cabal showed impressive initiative. She felt that a weakness in our communication and information storage was that we were relying too much on e-mail. She set up an alternative system, trained all of us, and coordinated our efforts to implement the use of the system for all of our internal communications. It is noteworthy that none of this work was part of our original plan for the semester. She simply saw a need and filled it. She also worked on outreach to firms and other legal employers to lay the groundwork for creating professional opportunities through the use of fellowships for people who had completed the paralegal program.

In Spring 2021, the students enrolled in my seminar, "Workshop on Meaningful Reentry." In the Workshop we ran a second cycle of an experimental version of the semester-long evening paralegal course (also on Zoom). For this pilot we had recruited 12 formerly incarcerated "co-designers," chosen on the basis of their personal and professional backgrounds. The co-designers played a dual role: they experienced the course as full participants, completing all of the in-class exercises and homework assignments and engaging in the classroom discussions; and they acted as our partners by offering their honest critiques of the course's effectiveness and making valuable suggestions for improving it. The law students had responsibility for helping to develop and refine the curriculum, recruiting and supporting facilitators, participating in interactive class exercises with the co-designers (often in "breakout rooms"), setting the agenda for our post-class debriefing meetings, and compiling our collective reflections after each week's meeting.

Ms. Cabal participated fully in all of the class activities and took a leading role in organizing or running many of the debriefing sessions. But she again saw unmet needs, and she moved to address these. She made the connections necessary to procure materials from the Law School for the co-designers that would enhance their participation in the course. And she also came up with the idea of giving the co-designers the opportunity to have professional quality photographs made to help them with their job searches. She found a photographer who was willing to provide *pro bono* services, and she handled all of the scheduling arrangements. Again, no one had thought of any of this; she came up with the idea and took responsibility for implementing it successfully.

Ms. Cabal continued in a leadership position in the program in her third year as Fellowship Co-Chair. In that role she oversaw our first round of fellowships for program participants, which were awarded at the end of the Spring 2022 semester of the paralegal course. This involved intensive work coordinating with potential partners on the details and requirements of these fellowships and designing information sessions and an application process for the participants.

I had one additional opportunity to work with Ms. Cabal. In her second year she asked me to serve as her academic advisor for the chapter she was writing for the *Jailhouse Lawyer's Manual* of our Human Rights Law Review. The chapter focused on the grievance procedures in Florida state prisons. There was a previous version of this chapter, but it was badly out of date, so Ms. Cabal had to research and rework the chapter completely. She also had to develop a complete mastery of the subject matter in order to explain the concepts in a way that would be practically useful to a lay audience (incarcerated individuals and their families) with no legal education.

Ms. Cabal did excellent work on this project. Her chapter was easily readable and comprehensive. The writing was polished with good attention to detail. She also showed an ability to accept constructive feedback and incorporate it into her work. In addition, in several places she developed charts to summarize the text visually. This was an effective way to communicate information to readers with different learning styles.

Ms. Cabal's accomplishments at Columbia went beyond her work with me. She was designated a Harlan Fiske Stone Scholar for overall academic performance. In addition, her writing, research, and organizational abilities earned her selection as Executive Articles Editor for the Human Rights Law Review.

Ms. Cabal has also shown an inspiring dedication to public interest work, with a particular focus on prison-related issues. Prior to law school, she was a research analyst with the Rochester Decarceration Initiative. In her first law school summer, she interned with Prisoners' Legal Services of New York, and during both semesters of her second year she had an externship in which she researched procedural issues relating to habeas corpus in capital cases. In her second summer she interned with the Legal Aid Society Prisoners' Rights Project. She also served as a research assistant for PPI under the supervision of my colleague Susan Sturm. In that role she launched a project – which was primarily her own idea – in which our PPI co-designers were compensated for providing feedback on chapters of the *Jailhouse Lawyer's Manual*. They offered suggestions about the substance and the readability and overall effectiveness of the chapters. This was a wonderfully successful and mutually beneficial collaborative undertaking.

Ms. Cabal was recognized by Columbia for this exceptional commitment to public interest work. She was awarded one of our prestigious Lowenstein Fellowships, which provides enhanced loan repayment assistance for students pursuing public interest careers.

As you know, Ms. Cabal is currently serving as a Staff Attorney with the Court of Appeals in the Second Circuit. She prepares bench memoranda and provides legal analysis and recommended dispositions for the judges in both counseled and *pro se* cases. She has found this experience immensely rewarding and is eager to build upon it with a judicial clerkship.

I am confident that Ms. Cabal would make important contributions to your work. She is smart, resourceful, and highly motivated. She has excellent writing, research, and organizational skills. And on a personal level, she has a refreshing modesty and lack of pretense. She is decidedly not a self-promoter; she simply takes initiative, performs her work, and does it successfully.

For all of these reasons, I am delighted to recommend Ms. Cabal to you. Please contact me if you need additional information.

Sincerely yours,

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CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is a bench memo providing legal analysis and a recommended disposition in a *pro se* appeal for a three-judge panel of the Second Circuit. Names of the parties have been changed along with any other identifying information. This writing sample has been lightly edited for grammar and is being used with permission from my supervisor at the Staff Attorney's Office.

Issue Raised and Recommendation

Issue: John Doe, proceeding *pro se*, appeals from a judgment dismissing his claims brought under 42 U.S.C. § 1983 and related state laws for, among other things, malicious prosecution. Pursuant to a warrant, Doe was arrested for violating the conditions of an order of protection after mail addressed to him arrived at his ex-wife's home—the apparent result of providing his former address when filling out a rental-car application. After the prosecutor entered a *nolle prosequi*, Doe sued the Franklin Police Department, the complaining witness, other individuals named in the order of protection, and the responding Franklin Police Department employee, Officer Smith. On a motion from the defendants, the district court dismissed the complaint, finding that, as relevant here, Doe failed to establish there was not probable cause for his arrest and subsequent prosecution. Doe now appeals only the dismissal of his state and federal malicious prosecution claims as to the complaining witness and Officer Smith. Additionally, Doe appeals the district court's failure to grant him leave to amend his complaint.

Recommendation: Affirm the judgment of the district court. Probable cause is a complete defense to malicious prosecution claims and Doe did not overcome the presumption that a judicial arrest warrant is supported by probable cause. The district court did not abuse its discretion when it failed to grant Doe leave to amend as Doe has not identified how amendment would cure the deficiencies in his complaint.

Background

In 2011, Jane Miller, a defendant in this case, obtained an order of protection against Doe. Record on Appeal ("ROA") doc. 1 (Compl.) ¶ 1. Doe was later accused of violating this order and eventually entered an *Alford* plea, which resulted in a 50-year extension of the order of protection, now set to expire in 2062. *Id.* ¶ 2. In 2017, the Order of Protection was modified to include Mark

Miller and Mary Miller, relatives of Jane Miller, as protected persons. *Id.* ¶ 21. As relevant here, the order of protection directed Doe to "not contact the protected person in any manner, including by written, electronic or telephone contact" and to "not contact the protected person's home, workplace, or others with whom the contact would be likely to cause annoyance or alarm to the protected person." *Id.* ¶ 34.

In 2016, Miller reported to the Franklin Police Department that she was receiving mail at her address, 10 Elm Street—where Doe had lived previously—that was addressed to Doe. *Id.* ¶ 20. The mail, "2 or 3" envelopes, were invoices from a rental car company including toll and parking violation receipts. *Id.*

Police Officer Smith called the rental car company. A representative told her that the address could have been obtained from old rental information, but agreed to send Officer Smith a copy of the rental agreement to determine if Doe provided Miller's address, thereby violating the order. ROA doc. 2 at 24. According to Officer Smith, the rental agreement, signed by Doe in November 2016, indicates 10 Elm Street as the address and includes his signature. *Id.* at 25, 26. Based on this information, in February 2017, Officer Smith submitted an arrest warrant application which was signed by a Connecticut state court judge, who found probable cause that Doe had violated the order of protection. Doe was arrested at the Canadian border in New York on July 4, 2017 and was held pending transport to Franklin. *Id.* at 23. Doe was released on bond on July 20, 2017 and defended the charges until the prosecutor entered a *nolle prosequi* in October 2018, approximately 18 months after Doe's arrest.

I. Proceedings in the District Court

In October 2021, Doe filed his complaint in the Northern District of New York. Doe named the Franklin Police Department, and Police Officer Smith (the "City" defendants), as well as the individuals named in the order of protection: Jane Miller, Mark Miller, Mary Miller (the "Miller"

defendants). On a motion from the City defendants, the case was transferred to the Connecticut District Court. Doe alleged malicious prosecution, false arrest, negligence, gross negligence, and intentional infliction of emotional distress under 42 U.S.C. § 1983. Doe also alleged state law claims for negligence, gross negligence, malicious prosecution, false arrest, false imprisonment, negligent infliction of physical pain and emotional distress, intentional infliction of physical pain and emotional distress, and defamation. Finally, Doe sought either declaratory or injunctive relief that would nullify the *Alford* plea or find the Order of Protection null and void. Both the Franklin and the Miller Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6).

The district court granted their motion, reasoning as follows.

a. Franklin Police Department

Because the Franklin police department is not a municipality, it is not capable of being sued under § 1983 or Connecticut state law. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 690; *Luysterborghs v. Pension and Retirement Bd. of City of Milford*, 50 Conn. Supp. 351, 354 (2007) ("The General Statutes do not contain a provision that generally establishes all municipal departments, boards, authorities and commissions as legal entities that operate separately from the municipality itself."). ROA doc. 60 (Order) at 5. Accordingly, all claims against the Franklin Police Department were dismissed with prejudice. *Id*. at 6.

b. Officer Smith

i. Malicious Prosecution, False Arrest, and False Imprisonment Claims

Officer Smith had probable cause to arrest Doe, and therefore Doe could not plead a plausible claim for malicious prosecution, false arrest, or false imprisonment. Probable cause is presumed as a matter of law when an arrest is made pursuant to a warrant issued by a neutral magistrate and Doe did not plausibly allege that Officer Smith prosecuted or arrested him without

probable cause because he did not identify any false statements in Smith's affidavit. ROA doc. 60 (Order) at 11–13.

ii. Remaining § 1983 Claims

Doe brought other claims pursuant to § 1983: "Negligence and Gross Negligence," "Physical Pain and Suffering" and "Intentional Infliction of Ongoing Emotional Distress" under the Fourth Amendment. The district court found that "[n]one of these claims are cognizable under the cited authority." *Id.* at 14. All § 1983 claims against Officer Smith were dismissed with prejudice.

iii. State Law Claims

Doe's state law causes of action failed to state a claim, were time barred, and, as to the negligence and negligent infliction of emotional distress causes of action, were precluded by governmental immunity. *Id.* at 14. All state law claims against Officer Smith were dismissed with prejudice. *Id*. at 14–15.

c. Miller Defendants

i. § 1983 Claims

Jane Miller is Doe's former spouse and the other named defendants are her relatives. Doe did not allege that any of the Miller defendants were government officials or that any of their conduct was "fairly attributable" to the state. *Id.* at 7. Therefore, the Miller defendants could not be held liable under § 1983 and the federal claims against them were dismissed with prejudice. *Id.*

ii. State Law Claims

Doe raised various state law claims outlined above. The district court found that they all failed as a matter of law for factual insufficiency. *Id.* However, it also determined that they each failed on the merits, reasoning as follows:

"Negligent infliction of physical pain" and "intentional infliction of physical pain" are not recognized causes of action under Connecticut law. *Id.* at 9. The negligence claim could not be sustained because a person protected by a protective order has no legal duty to the person against whom the protective order is issued to refrain from opening or reporting mail sent to her residence, s*ee Pelletier v. Sordoni/Shanska Const. Co.*, 286 Conn. 563, 578 (2008). ROA doc. 60 (Order) at 8. The false arrest claim failed because Doe was arrested pursuant to a warrant supported by probable cause, *see Lo Sacco v. Young*, 20 Conn. App. 6, 20 (1989). ROA doc. 60 (Order) at 8. The negligent infliction of emotional distress claim failed because a person protected by a restraining order who receives mail and then reports that mail is not engaged in behavior that would have an unreasonable risk of causing emotional distress, *see Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 446–47 (2003). ROA doc. 60 (Order) at 8. Finally, the conduct Doe alleged was not sufficiently outrageous as a matter of law to support an intentional infliction of emotional distress claim, *see Appleton v. Bd. of Educ. of Town of Stonington*, 254 Conn. 205, 210–11 (2000) (discussing what constitutes outrageous conduct as a matter of law). ROA doc. 60 (Order) at 9.

The district court also denied Doe leave to amend his state law claims because his causes of action were time barred and therefore futile. *Id.* Doe was arrested on July 4, 2017, but did not file his complaint until October 20, 2020. The court determined that the arrest was both the occurrence at issue and the time at which Doe discovered some form of actionable harm. In Connecticut, negligence, gross negligence, and negligent infliction of emotional distress carry a two-year statute of limitations and three-year statute of repose. Conn. Gen. Stat. § 52-584. ROA doc. 60 (Order) at 9. Malicious prosecution, false arrest, false imprisonment, and intentional infliction of emotional distress and economic damages are subject to a three-year statute of

limitations. Conn. Gen. Stat. § 52-577; ROA doc. 60 (Order) at 10. The court found that all of Doe's state law claims were therefore time barred and amendment would be futile.

II. Proceedings in this Court

Doe explicitly appeals only the dismissal of his § 1983 and state law malicious prosecution claims against Jane Miller and Officer Smith. 2d Cir. doc. 34 (Brief) at 1. Doe argues there was no probable cause to arrest and prosecute him, and that information in the affidavit supporting the arrest warrant is false. Additionally, Doe argues that his state law claim was timely brought and that the district court should have granted him leave to amend so that he might sufficiently plead facts. *Id.* at 6.

The defendants both urge this Court to affirm the district court's judgment. Officer Smith argues that because Doe's arrest was made pursuant to a valid judicial warrant, Doe cannot establish probable cause. 2d Cir. doc. 46 (Brief) at 6. Miller argues that she is a private citizen and therefore Doe's federal and state law claims cannot be sustained against her. 2d Cir. doc. 49 (Brief) at 10.

Discussion

This Court "review[s] the grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013). A complaint "must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

I. Malicious Prosecution

Under Connecticut law, a malicious prosecution claim requires proof that "(1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without

probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." *Spak v. Phillips*, 857 F.3d 458, 461 n.1 (2d Cir. 2017) (quoting *Brooks v. Sweeney*, 299 Conn. 196, 210–11 (2010)). Similarly, under § 1983, the elements of an action for malicious prosecution are "(1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice." *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003).

Under both Connecticut and federal law, probable cause is a complete defense to malicious prosecution. *See Mara v. Rilling*, 921 F.3d 48, 73 (2d Cir. 2019) (citing *McHale v. W.B.S. Corp.*, 187 Conn. 444, 447 (1982)). The relevant probable cause analysis "looks to the law of the state where the arrest and prosecution occurred." *Washington v. Napolitano*, 29 F.4th 93, 104 (2d Cir. 2022), *cert. denied*, No. 22-80, 2022 WL 17408172 (Dec. 5, 2022). The federal and Connecticut standards are substantively identical, requiring that "officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Id.* at 104–05.

"[I]t is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness." *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000) (internal quotation marks omitted). And an arrest authorized by a judicial warrant is generally "presumed" to be supported by probable cause. *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (such warrants "may issue only upon a showing of probable cause"). To establish otherwise, a plaintiff must show (1) that supporting warrant affidavits "on their face, fail to demonstrate probable cause"; or (2) that defendants misled

a judicial officer into finding probable cause by knowingly or recklessly including material misstatements in, or omitting material information from, the warrant affidavits. *Id.* at 156.

The district court correctly dismissed the malicious prosecution claims against the defendants because Doe's arrest was made pursuant to a warrant issued by a neutral magistrate and Doe has failed to show that this warrant was supported by false or misleading information. Doe was arrested for violating a protective order that ordered him not to "contact the protected person in any manner, including by written, electronic or telephone contact and do not contact the protected person's home, workplace or others with whom the contact would be likely to cause annoyance or alarm to the protected person." ROA doc. 1 (Compl.) at 34. Doe argues that the letters sent to Miller's home were sent automatically and that he did not, by definition, "contact" Miller, as a third party, the rental car company, actually sent the letters. 2d Cir. doc. 34 at 7.

However, an officer's assessment of whether an offense has been committed need not "be perfect" because "the Fourth Amendment allows for some mistakes on the part of government officials," including "reasonable . . . mistakes of law." *Heien v. North Carolina*, 575 U.S. 54, 60–61 (2014). Therefore, even if Officer Smith mistakenly believed that the letters sent to Miller's home qualified as "contact," for the purpose of Conn. Gen. Stat. § 53a-40e, this mistake was likely reasonable, and therefore non-actionable. *See United States v. Coleman,* 18 F.4th 131, 140 n.4 (4th Cir. 2021*)* ("Under *Heien*, an officer's mistake of law may be reasonable if the law is ambiguous, such that reasonable minds could differ on the interpretation, or if it has never been previously construed by the relevant courts"); *United States v. Diaz*, 854 F.3d 197, 204 (2d Cir. 2017) (officer's "assessment was premised on a reasonable interpretation of an ambiguous state law, the scope of which had not yet been clarified" and other New York courts had reached conflicting conclusions).

While it is unclear whether Doe actually violated the protective order, the record shows that Officer Smith sought information to ensure to some extent that the contacts were initiated by Doe and not the byproduct of old information. In the application for the arrest warrant, Officer Smith states that she spoke to a car rental representative who said that Doe provided Miller's address. ROA doc. 1 at 20. Further, in the original incident report, Officer Smith writes that the address "could have been obtained from old rental information" but that she would obtain a copy of the rental agreement to determine if Doe provided the address. ROA doc. 1 at 24. Given the arguably broad wording of the protective order, and the fact that Officer Smith explicitly sought information to confirm that Doe had affirmatively provided Miller's address, Doe's allegations do not overcome the presumption that probable cause supported the judicial warrant.

While the probable cause justification for Doe's prosecution is arguably thin, Doe still has not pled that Miller or Officer Smith acted with malice, a required element of a malicious prosecution claim under federal and Connecticut law. *See Spak v. Phillips*, 857 F.3d 458, 461 n.1 (2d Cir. 2017) (quoting *Brooks v. Sweeney*, 9 A.3d 347, 357 (Conn. 2010)); *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003). Doe's argument, that the defendants acted with malice, is based exclusively on allegations that they lacked probable cause to arrest him. 2d. Cir. doc. 34 (Brief) at 15. Malice may be inferred from a lack of probable cause, *Rentas v. Ruffin*, 816 F.3d 214, 221 (2d Cir. 2016), however, as discussed above, Doe has not overcome the presumption that probable cause existed for his prosecution based on the judicial warrant.

Additionally, Miller is a private citizen. To prevail under § 1983, a plaintiff must demonstrate that a defendant acting under the color of state law deprived them of their rights. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Miller was not acting under color of state law. Further, Doe's complaint does not allege facts showing "(1) an agreement between a

state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002). Under Connecticut law, an action for malicious prosecution against a private person requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice. *McHale v. W. B. S. Corp.*, 187 Conn. 444, 447 (1982). As discussed above, there is little indication that Officer Smith, much less Miller, the complaining witness, acted without probable cause, or with malice. The district court correctly dismissed Doe's federal and state malicious prosecution claims against both of these defendants.

II. Leave to Amend

This court reviews *de novo* a district court's denial of leave to amend based on futility. *Olson v. Major League Baseball*, 29 F.4th 59, 71–72 (2d Cir. 2022). Amendment is futile if the proposed amended complaint fails to cure prior deficiencies or to state a claim upon which relief can be granted. *Panther Partners, Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012).

On Doe's state law claims, the district court found that leave to amend would be futile because they were time barred. *See* Conn. Gen. Stat. § 52-577 ("No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."). ROA doc. 60 (Order) at 9. Doe was arrested on July 4, 2017, the *nolle prosequi* was entered in his favor in October 2018, and he brought this claim in October 2021.[1] The district court determined that

[1] The time bar does not apply to Doe's § 1983 claims. A three-year statute of limitations period applies to Doe's § 1983 claims. *See Lounsbury v. Jeffries*, 25 F.3d 131, 132 (2d Cir. 1994) (stating that § 1983 actions arising in Connecticut are governed by the three-year period set forth

Doe's state law cause of action for malicious prosecution arose, at the latest, on the date of his arrest. ROA doc. 60 (Order) at 10. In support of this accrual date, the court cited an unreported case, *Gojcaj v. City of Danbury*, U.S. Dist. LEXIS 696, at *6 (D. Conn. 2016), for the proposition that "Connecticut state law causes of action for malicious prosecution begin to run at the outset of the prosecution." ROA doc. 60 (Order) at 10.

Under § 52-577, the applicable statute of limitations period commences upon the "act or omission complained of." *See Evanston Ins. Co. v. William Kramer & Assocs., LLC*, 890 F.3d 40, 45 (2d Cir. 2018). Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." "Section 52-577 is a statute of repose that sets a fixed limit after which the tortfeasor will not be held liable. . . [S]ection 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." *Pagan v. Gonzalez*, 113 Conn. App. 135, 139 (2009) (quoting *Labow v. Rubin*, 95 Conn. App. 545, 467–68 (2006)). "When conducting an analysis under § 52-577, the only facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." *Id.*

Despite the district court's citation to *Gojcaj*, review of the case law reveals that there is mixed treatment of the accrual date under Connecticut common law: *Silano,* No. CV-18-6076642

in Connecticut General Statute § 52-577). However, § 1983 and state law claims differ as to the date on which the statute of limitations begins to run. For § 1983 claims, federal law, not state law, determines the accrual date of a claim. *See Wallace v. Kato*, 549 U.S. 384, 388, 2d 973 (2007). A malicious prosecution claim accrues when "criminal proceedings have terminated in the plaintiff's favor." *Heck v. Humphrey*, 512 U.S. 477, 489 (1994). Doe's criminal proceedings terminated in his favor in October 2018, when the prosecutor entered a *nolle prosequi.* The latest Doe could have brought his claim was October 2021. Doe filed in the district court in October 2021 and his § 1983 claims are therefore timely.

S, LEXIS 825, at *9 (Super. Ct. Jan. 9, 2020) (rejecting a common law malicious prosecution claim under § 52-577 when it was filed three years from the favorable disposition of the underlying criminal action); *Washington v. Ivancic*, 113 Conn. App. 131, 134 (2009) (holding that, based on *Lopes v. Farmer*, 286 Conn. 384 (2008), the statute of limitations in a § 52-577 malicious prosecution claim commences to toll from the date the criminal matter is dismissed.); *Turner v. Boyle*, 116 F. Supp. 3d 58, 91 (D. Conn. 2015) (a state law claim for malicious prosecution "accrues only after the underlying action terminates in the plaintiff's favor"). While various courts cite *Lopes v. Farmer*, 286 Conn. 384 (2008), *Lopes* dealt only with a § 1983 malicious prosecution claim. It is unclear when a Connecticut common law claim for malicious prosecution begins to run.

However, because the district court decided this case on the merits, and Doe has not identified any amendments that would cure his pleading deficiencies, amendment would be futile. In his brief before this Court, Doe merely restates the pro se amendment standard. ROA doc. 34 (Brief) at 6. Doe also alleges, in a separate section, for the first time, that there were false statements about his prior arrest record in Officer Smith's affidavit for the arrest warrant. *Id.* at 9–10. As discussed previously, Doe has not overcome the presumption that probable cause for his arrest existed. The application for the arrest warrant indicates that mail addressed to himself was sent to Miller's home, in violation of the order of protection. It is unclear, and Doe has not identified, how these new allegations about his criminal record would cure his complaint. While this Court has held that district courts should generally not dismiss a pro se complaint without granting the plaintiff leave to amend, leave to amend is not necessary when it would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (finding leave to replead would be futile where the complaint, even when read liberally, did not "suggest[] that the plaintiff has a claim that

she has inadequately or inartfully pleaded and that she should therefore be given a chance to reframe"). Because Doe has not offered any new factual allegations or legal theories that would cure the existing complaint's deficiencies, the district court's denial of leave to amend was correct.

Conclusion

For the above reasons, it is recommended that this Court affirm the judgment of the district court.

Applicant Details

First Name	**Rebekah**
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Applicant Education

BA/BS From	**Roanoke College**
Date of BA/BS	**December 2018**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 25, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard National Security Journal** **Harvard Law Review** **Harvard Human Rights Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Ames Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Tanya S. Chutkan
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan,

I am a recent Harvard Law School graduate and, last year, I served as a Supreme Court Chair for the 135th Volume of the *Harvard Law Review*. As I will be spending the 2023 term clerking for Judge Miller on the Ninth Circuit, I am writing to apply for a position as a judicial clerk in your chambers for the 2024 term..

I would be especially honored to bring my varied experiences in government — including working in several components of the Department of Justice, for U.S. District Court Judge Burroughs of the District of Massachusetts, as well as in the public defense of juveniles with Massachusetts Committee for Public Counsel Services — to your chambers and to have the opportunity to begin my legal career learning from someone who has demonstrated a similar commitment to public service.

Enclosed please find my resume, law school transcript, undergraduate transcript, and a writing sample. The writing sample is a draft opinion I wrote for a seminar entitled "Supreme Court Decision Making." Details explaining this writing sample further can be found in a cover page attached to the writing sample.

You will also receive letters of recommendation from the following people:

Professor Jack Goldsmith	**Professor Richard Lazarus**	**W. Neil Eggleston**
Harvard Law School	Harvard Law School	Harvard Law School
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If you have any questions about my application, or if you would like more information, do not hesitate to contact me. Thank you for your time and consideration.

Sincerely,

Rebekah Carey

Enclosures

REBEKAH R. CAREY
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EDUCATION

HARVARD LAW SCHOOL, Cambridge, MA, J.D. *cum laude*, May 2023
Activities: *Harvard Law Review*, Volume 135 Supreme Court Chair, Public Interest Committee Co-Chair
Teaching Fellow/Research Assistant for Lecturer Eggleston's Reading Group, "The New Supreme Court" (Fall 2022)
National Security Law Association, Co-President (2022–23), Executive Vice President (2021–22)
Women's Law Association, Board Member (2021–23)
Harvard Law School National Security Journal, Senior Editor (2021–22), Principal Senior Editor (2019–20)
Harvard Human Rights Journal, Staff Editor (2019–20; 2021–22)
Honors: 2022 Summer Heyman Fellow

ROANOKE COLLEGE, Salem, VA, B.A. *summa cum laude* in Political Science & Criminal Justice, December 2018 GPA: 3.93
Honors: Phi Beta Kappa; Honors in the Major, Political Science; Senior Scholar in Political Science (awarded to one student per year); C. Will Hill, Jr. Criminal Justice Award (awarded to one student per year); Pi Sigma Alpha, National Political Science Honor Society; Alpha Phi Sigma, National Criminal Justice Honor Society

PUBLICATIONS

Note, *Responding to Domestic Terrorism: A Crisis of Legitimacy*, 136 HARV. L. REV. 1914 (2023); *The Supreme Court, 2020 Term — Leading Cases*, 135 HARV. L. REV. 343 (2021); *The Supreme Court 2020 Term — The Statistics*, 135 HARV. L. REV. 491 (2021); Recent Case, Doe v. University of the Sciences*, 961 F.3d 203 (3d Cir. 2020)*, 134 HARV. L. REV. 2590 (2021); Sarah Bessell & Bekah Carey, *Nestlé & Cargill v. Doe Series: Shielding American Corporations from Liability Undermines the United States' Moral Authority*, JUST SECURITY (Dec. 21, 2020); REBEKAH R. CAREY, FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 2020 DATA UPDATE, HUM. TRAFFICKING LEGAL CTR. (2021).

EXPERIENCE

HON. ERIC D. MILLER, U.S. COURT OF APPEALS, NINTH CIRCUIT, Seattle, WA Forthcoming, 2023 – 2024
Law Clerk

HON. ALLISON D. BURROUGHS, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, Boston, MA Spring 2023
Judicial Extern
Conduct legal research. Draft orders. Review drafted materials for substantive and technical accuracy.

U.S. DEPARTMENT OF JUSTICE, NATIONAL SECURITY DIVISION, Washington, DC Summer 2022
Legal Intern, *Office of Law & Policy* (interim secret clearance)
Conduct legal research. Draft memoranda, legal & policy analysis, factual research. Assist with presentations & supporting materials.

HOOVER INSTITUTION, Cambridge, MA Spring 2022 – Present
Research Assistant to Professor Goldsmith
Assisted in planning, editing, and publishing the Aegis Paper series through the Hoover Institution. Provided suggested high-level and technical edits to authors. Supervised other research assistants assisting in the editing process.

HUMAN TRAFFICKING LEGAL CENTER, Washington, DC Summer 2020 – Summer 2022
Legal Fellow
Conducted legal research and wrote legal memoranda on legal questions related to human trafficking. Updated, improved, and maintained multiple databases cataloguing federal human trafficking cases.

UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF MASSACHUSETTS, Boston, MA Spring 2022
Clinical Extern, *Major Crimes Unit*
Conducted legal research and wrote legal memorandum related to criminal investigations and pending cases. Drafted litigation documents in preparation for trials and sentencings. Assisted in trial preparation.

YOUTH ADVOCACY DIVISION, Malden, MA Fall 2021
Clinical Extern
Conducted legal research in anticipation of litigation. Drafted motions and evaluated discovery material in preparation for trial. Assisted in strategic trial preparation. Participated in other forms of client advocacy.

U.S. ATTORNEY'S OFFICE, WESTERN DISTRICT OF VIRGINIA, Roanoke, VA Fall 2018 – Summer 2019
Data Analyst, Forfeiture Support Associates
Organized and managed case files. Reviewed data for completeness and proper execution of asset management. Conducted legal research regarding relevant civil and criminal forfeiture. Drafted legal documents, including indictments, motions, and proposed orders.

U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, Washington, DC Spring 2018
Undergraduate Intern, *Child Exploitation and Obscenity Section*
Assisted paralegal and attorney staff in performing legal and factual research. Digested substantive materials and transcriptions of trial testimony and witness interviews. Reviewed and analyzed information, including statistical data, relevant to criminal cases and matters.

LANGUAGES AND INTERESTS

Conversational French. Interested in baking (especially scones), road tripping to national parks, & bouldering.

Harvard Law School

Date of Issue: June 6, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Rebekah R Carey
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023 Cum Laude
Pro Bono Requirement Complete

JD Program

Fall 2019 Term: August 27 - December 18

1000	Civil Procedure 5 Rubenstein, William	P	4
1006	First Year Legal Research and Writing 5B Winsberg, Sarah	P	2
1003	Legislation and Regulation 5 Stephenson, Matthew	H	4
1004	Property 5 Mack, Kenneth	H	4
1005	Torts 5 Lazarus, Richard	H	4

Fall 2019 Total Credits: 18

Winter 2020 Term: January 06 - January 24

1053	What Kind of Lawyer Do You Want to Be?: An Introduction to Legal Practice in Different Practice Settings Rakoff, Todd	CR	3

Winter 2020 Total Credits: 3

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

1024	Constitutional Law 5 Delaney, Erin	CR	4
1001	Contracts 5 Lessig, Lawrence	CR	4
1002	Criminal Law 5 Lvovsky, Anna	CR	4
1006	First Year Legal Research and Writing 5B Winsberg, Sarah	CR	2
2505	Supreme Court Decision Making Singer, Joseph	CR	2

Spring 2020 Total Credits: 16
Total 2019-2020 Credits: 37

Leave of Absence, Fall 2020 - Spring 2021

Fall 2021 Term: September 01 - December 03

8001	Child Advocacy Clinic: System-Involved Youth Hazen, Crisanne	H	4
2275	Child Advocacy: System-Involved Youth Clinical Seminar Hazen, Crisanne	H	2
3101	Digital Governance: Privacy and Technology Trade-Offs Goldsmith, Jack	H	2
2079	Evidence Lvovsky, Anna	H	4
2103	Government Lawyer Whiting, Alex	H	2
3109	The New Supreme Court: changing views on the fundamental structure of government Eggleston, W. Neil	CR	1

Fall 2021 Total Credits: 15

Winter 2022 Term: January 04 - January 21

2122	International Commercial Arbitration Beckett, Mark	H	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

2000	Administrative Law Beermann, Jack	H	3
2050	Criminal Procedure: Investigations Natapoff, Alexandra	H	4
8017	Government Lawyer: United States Attorney Clinic Whiting, Alex	H	5
2949	Presidential Power in an Era of Conflict Eggleston, W. Neil	H	2

Spring 2022 Total Credits: 14
Total 2021-2022 Credits: 32

Fall 2022 Term: September 01 - December 31

2086	Federal Courts and the Federal System Goldsmith, Jack	H	5
2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3

Fall 2022 Total Credits: 8

Fall-Winter 2022 Term: September 01 - January 31

8003	Criminal Prosecution Clinic Corrigan, John	H	5

continued on next page

Assistant Dean and Registrar

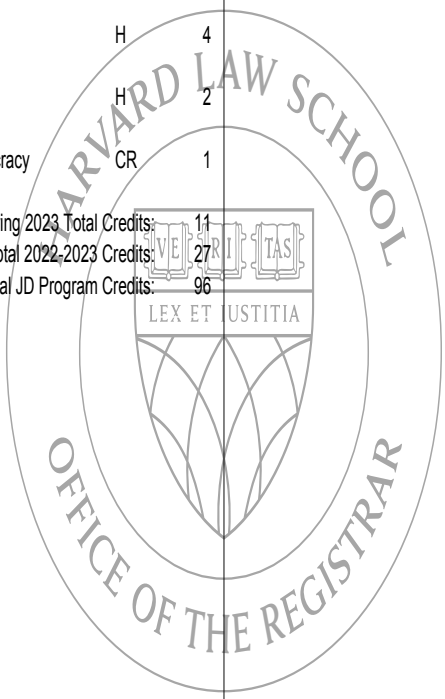
Harvard Law School

Record of: Rebekah R Carey

Date of Issue: June 6, 2023
Not valid unless signed and sealed

2328	Criminal Prosecution Clinical Seminar Corrigan, John	H	3
	Fall-Winter 2022 Total Credits:		8
	Spring 2023 Term: February 01 - May 31		
2035	Constitutional Law: First Amendment Campbell, Jud	P	4
8022	Judicial Process in Trial Courts Clinic Cratsley, John	H	4
2139	Judicial Process in Trial Courts Clinical Seminar Cratsley, John	H	2
3214	Statutory Interpretation in a Constitutional Democracy Manning, John	CR	1
	Spring 2023 Total Credits:		11
	Total 2022-2023 Credits:		27
	Total JD Program Credits:		96

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 12, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I write to recommend highly Rebekah Carey for a clerkship in your chambers. She will be an extraordinary clerk.

Bekah graduated summa cum laude from Roanoke College in 2018. She came to Harvard Law School after working for a year in the U.S. Attorney's Office in the Western District of Virginia. Bekah has done very well at Harvard. She has almost all Hs in her first two years. What is most impressive about this consistent academic success is that it comes on top of unusually heavy extracurricular commitments and accomplishments. Bekah was the Supreme Court Chair on the Harvard Law Review, and has published two fine Notes there. She also, as her resume indicates, serves on two other journals, is the Co-President of the National Security Law Association, has had several interesting fellowships/externships, and has been heavily involved in numerous student organizations. (The resume understates her activities. She has also been involved with Advocates for Human Rights; a 1L Representative for the Program on Law & Government; and an active participant in Christian Fellowship, Christian Union, and the Program on Biblical Law & Christian Legal Studies.)

I have gotten to know Bekah primarily in two capacities. First, she was one of the best students in my data privacy seminar in the fall of 2021. She wrote eight excellent short essays on various subjects—many about how privacy harms fare under the Fourth Amendment and Article III standing doctrine; but also, among other topics, on the special legal privacy problems implicated by children and technology, and how AI impacts privacy issues. The papers were all superb. Bekah unsurprisingly writes beautifully and clearly. She reads carefully and has thoughtful, imaginative reactions to the reading. She is a precise doctrinal analyst; her papers on how standing law defined substantive privacy rights were especially insightful. In class her contributions were always intelligent and constructive. She got the second-best grade in a class of 24 students.

Second, based on these experiences, I asked Bekah to help me as my assistant in a national security paper series I do for the Hoover Institution at Stanford University. It is Bekah's work here that, on top of her work in my seminar, convinces me she will be a great clerk. Bekah immediately took the initiative with her tasks: editing a poorly crafted paper, marshalling students for cite-checks, and helping me figure out topics and authors. She is a whirlwind of creativity, organization, and productivity. I once asked her how she does so many things at once, all well, and she told me: "Being organized is also just how I naturally work. I have to stay organized and also be wise in terms of how I think about prioritizing all the different demands on my time." That has certainly been my experience. She was terrific in the one substantive edit she has done thus far. It involves a paper by a CIA officer on early congressional oversight of the CIA. The paper has promise, but is a bit of a mess as written. Bekah gave me outstanding edits on it, both at the level of clarifying line-edits, and also at the level of large organizational suggestions that will improve and clarify the paper's thesis. None of this surprises me. Bekah has a lot of legal writing and editing experience, and all of her written products are outstanding.

Bekah has other characteristics that will serve her well as a clerk. She works very hard and gives one hundred percent on every task. She stands out among her classmates for being open-minded and intellectually curious. And she is one of the kindest, most upbeat students I have had in a long while. She always carries a smile and she has a sunny disposition.

In sum, Bekah is the complete package in a law clerk. She will work hard to ensure that your work is its very best, and she will be a very positive presence in chambers.

Sincerely,

Jack L. Goldsmith

Jack Goldsmith - jgoldsmith@law.harvard.edu - 617-384-8159

June 12, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am quite pleased to write a letter of recommendation for Rebekah Carey. I have had Ms. Carey in two of my classes. I taught a Reading Group last fall on how the new Supreme Court will change the functioning of our government. A reading group has smaller classes, and is pass fail. Ms. Carey also took my full seminar in Presidential Power this past spring. I was in the White House Counsel's Office in the Clinton Administration. I was the White House Counsel for the last three years of President Obama's term. I am also a full time litigation pattern in the Washington, DC office of Kirkland & Ellis.

Ms. Carey was a star in both of my classes this past year. She consistently offered clear, concise, and intelligent viewers in both classes. She was an active participant, but not excessively so. Some students talk a lot (part of their grade is based on class participation), but the comments are not particularly incisive. That does not describe Ms. Carey. Her comments were always on point and advanced the discussion in the class. She was also quite respectful of the views of her classmates. Students from across the political spectrum tend to take my Presidential Power seminar. That mix offers lively discussion, but can sometimes turn overly heated. Ms. Carey always stood her ground, but with no hint of condescension to the opposing view.

I also had a significant opportunity to see her writing. In the seminar, the students had to write three 1000 word papers and a 4000 word final paper. Her writing was engaging, creative, and thoughtful. I always looked forward to her papers because I knew they would be enjoyable.

Finally, Ms. Carey was well liked and respected by her classmates in both classes. She would be a wonderful addition to your chambers. If you want to discuss Ms. Carey, please call me.

Sincerely,

W. Neil Eggleston, Esq.
Visiting Lecturer on Law,
Harvard Law School
Kirkland & Ellis LLP
1301 Pennsylvania Avenue, N.W.
neil.eggleston@kirkland.com
(202) 389-5015

June 12, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am writing in support of the application of Bekah Carey, who will be graduating this May, for a clerkship position in your chambers. I have known Bekah since the fall of her first year of law school when she was a student in my Torts class. I also served as the Faculty Section Leader for her first year section, which provided me many opportunities to work with and get to know Bekah outside of Torts. Most simply put, Bekah was clearly my law school equivalent of baseball's most valuable player that year and I have been a big fan ever since. Although she has not subsequently been a student in one of my classes, I have very enjoyed watching her thrive ever since. I have no doubt she will be an outstanding judicial clerk.

Bekah is a summa cum laude graduate of Roanoke College in Salem, West Virginia, which is not a school with which I have had much experience. However, as the Faculty Chair of our law schools admissions committee, I am well aware that many of our highest achieving students —who go on to serve significant roles in the legal profession — are graduates of small schools like Roanoke. And it is always a special treat to play a role in their admission and then watch when, like Bekah, they excel in so many ways, both in and out of the classroom.

In Torts, Bekah was spectacular. She was fully engaged with the course material and wonderful engaging in class. Her enthusiasm for the course material, and the hard questions they raised for students, was palpable from day one. And that enthusiasm never ebbed throughout the semester. Indeed, from what I have noticed in my discussions with Bekah ever since, that same palpable enjoyment for learning continues undiminished.

Bekah is personally delightful to be sure. But, more important for me as a law teacher, she is no less delightful in discussing the law. Her delight in learning is also wonderfully contagious. She lights up a room and the entire class, and its discussion, is better because she is there.

I was not at all surprised and very pleased when her final exam in Torts was so excellent that she earned an Honors grade. Because of our relatively strict grading curve, most law students in our larger classes, including all first year classes, receive the same grade of Pass. It is exceedingly hard to write an exam so distinguished that it warrants an Honors grade, given the extraordinary talent of students admitted to Harvard Law School. Yet Bekah impressively received three grades of Honors in her first semester of law school. I have no doubt she would have received at least that number second semester, but our law school, like most law schools across the country did not award grades that spring in response to the enormous disruption to all caused by our sudden shutdown of the campus in mid-March.

Like a fair number of students, Bekah took a gap year from taking courses after her first year, preferring not to have a year of Zoom teaching. She described to me at the time what a tough decision it was because how close she felt to all of her classmates. But she ultimately concluded that she would miss too much of the fuller law school experience, and be deprived of the in-person formats in which she learned best, to spend a year limited to remote learning. It was a very mature and in some ways a courageous decision for a young person to make, reflecting her judgment of how she could best prepare herself to become an outstanding lawyer.

On Bekah's return to classes, Bekah received all Honors grades during her entire second year of law school and again this past fall of her third year: a total of eleven additional classes. That's a terrific academic record and puts Bekah well on track to graduate with honors this May. And that was on top of serving as one of two Supreme Court Chairs of the Harvard Law Review. Bekah was selected to serve on HLR after her first year, which is by itself a high honor. Fewer than nine percent of our eligible student body serves on HLR; at our peer schools like Yale, Chicago, and Stanford that percentage is three and four times higher, and they have editorial boards larger than ours, even though their student body sizes are far smaller than ours. Bekah has published repeatedly in HLR and other publications, and her selection to serve as Supreme Court Chair — a particularly prestigious board position — says a lot about how highly Bekah's skills are viewed by other students on HLR.

Bekah's commitment to public service and clear focus on national security law are also worthy of mention. She worked for the Human Trafficking Legal Center during her gap year, and has continued that relationship since going back to school. Last summer Bekah worked at the U.S. Department of Justice in the National Security Division. She also worked at the local U.S. Attorney's Office last spring.

Bekah could easily have obtained a position during her summers at many of the most high-paying law firms in the country had she wanted to do so. And that would of course have been perfectly fine. Those are excellent jobs. But I cannot help but notice and be favorably impressed when a student's commitment to public service is, like Bekah's, so great that they eschew those opportunities in favor of government jobs. Her selection of summer jobs underscores her maturity, deserved self-confidence, and professional focus.

I end where I began, Bekah will be an outstanding judicial clerk. She will light up your chambers as she has lit up Harvard Law School. Thank you for considering Bekah's application and do not hesitate to contact me if you have any questions.

Richard Lazarus - lazarus@law.harvard.edu - 617-495-8015

Sincerely,

Richard J. Lazarus

Richard Lazarus - lazarus@law.harvard.edu - 617-495-8015

REBEKAH R. CAREY
443-986-4471 • rcarey@jd22.law.harvard.edu

WRITING SAMPLE

Drafted Spring 2020

This writing sample was an assignment for Professor Joseph Singer's "Supreme Court Decision Making" class. The class was set up as a simulation — where half of the simulations were of United States' Supreme Court cases that were pending during the October 2019 Term and the other half were of hypothetical state supreme court cases modeled off real cases. Each student was assigned a case for which they were tasked with writing an opinion. Professor Singer's learning outcomes for the course included helping students "get the sense of what it is like to make such decisions in a collegiate court that requires a majority vote to establish a rule of law, and how to write justificatory opinions that show respect for judges on the other side and for the losing party."

The class would spend a full class period on each case, split over two days. The first day for any given case would involve an initial "conference" where students were expected to have read the underlying briefing materials in order to share both how they would vote on a case and their preferred reasoning. The student assigned to write the opinion was tasked with taking other students' preferences into account, to the extent they wanted their opinion to be the majority opinion. Per Professor Singer's instructions, it was the job of the assigned opinion writer to "take careful notes of the arguments made by everyone in class." Further, opinions "should acknowledge and respond to arguments on the other side, as well as arguments by those who agree with the result but want a different rule of law or a different source of law to justify the result and may be thinking about writing a concurring opinion." The opinion writer then had several weeks to draft an opinion and circulate it to the rest of the class. Other students were invited to write short concurrences or dissents. Then, a second class period on the case was conducted as another conference, where the authors would explain their opinions and other students would decide how to vote.

In a class of twelve, I was the only first-year student. I was assigned the case of *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), where the Supreme Court had granted a writ of certiorari on the question of "[w]hether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any 'discrimination based on age,' 29 U.S.C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action." As far as I can recall, I was the only student whose opinion was unanimously joined, at least in part. My mock opinion was written before the Supreme Court released its opinion on the matter.

SUPREME COURT OF THE UNITED STATES

No. 18-882

NORIS BABB, PETITIONER *v.* ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[DRAFT — February 18, 2020]

JUSTICE CAREY delivered the opinion of the Court.

A federal statute, 29 U.S.C. § 633a(a), provides protection from discrimination for federal-sector employees. The statute provides that "[a]ll personnel actions" affecting federal-sector employees "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). In this case we consider whether the provision requires "but-for" causation. After examining the plain text, as well as the statute's origins, history, and context; we conclude that the statute provides for no such requirement.

I

Dr. Norris Babb, a pharmacist at the C. W. "Bill" Young VA Medical Center in Bay Pines, Florida, sued the Department of Veteran affairs alleging violations of multiple employment discrimination statutes, including the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634. The district court granted the defendant's motion for summary judgment, finding the *McDonnell Douglas* standard applicable to Babb's age-discrimination claim.

Babb appealed. She argued the district court erred in applying the *McDonnell Douglas* standard, rather than a more lenient "motivating factor" test. The Court of